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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 56

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE F. & R. LAZARUS & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 16, 1939

CERTIORARI GRANTED OCTOBER 9, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 56

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE F. & R. LAZARUS & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket Entries—No. 69481	1	1
Docket Entries—No. 69750	4	3
Petition—No. 69481	7	5
Exhibit A—Notice of Deficiency	11	8
Answer—No. 69481	15	11
Petition No. 69750	16	11
Exhibit A—Notice of Deficiency	20	14
Answer—No. 69750	23	16
Opinion of the Board, Seawell, M	24	16
Decision—No. 69481	34	24
Decision—No. 69750	34	24
Petition for Review and Assignments of Error	35	25
Notice of Filing Petition for Review	39	28
Notice of Filing Petition for Review	40	28
Statement of Evidence	41	29
Caption	41	29
Testimony of—		
C. L. Converse (deposition)	41	29
Fred Lazarus, Jr., (deposition)	44	32
B. G. Huntington	50	36
Lowry Sweney	50	37
D. W. Beggs	53	39
Fred Vercoe	54	40
Clarence Palmer	55	40
J. W. Steinhauser	56	41
Order settling statement of evidence	59	43

	Original	Print
Proceedings before United States Board of Tax Appeals—Continued.		
Statement of Evidence—Continued.		
Petitioner's exhibits:		
No. 1—Appraisal Report dated June 13, 1928	60	43
No. 2—Minutes of Special Meeting of Board of Directors of The F. and R. Lazarus & Company, May 28, 1928	61	44
No. 3—Schedule of Land Trust Retirement Figures	62	45
No. 4—Letter dated June 5, 1928, Lowry Sweney to Lazarus	63	45
No. 5—Letter dated June 7, 1928, Lowry Sweney to Lazarus	67	48
No. 6—Lease dated June 1, 1928, between Huntington National Bank of Columbus, Trustee, and The F. and R. Lazarus and Company	71	51
No. 7—Agreement and Declaration of Trust dated June 1, 1928, between Huntington National Bank of Columbus, Trustee, and Holders of Land Trust Certificates, etc	128	95
No. 8—Circular (face)	159	118
Respondent's exhibits:		
A—Record of Stockholders' Meeting of F. & R. Lazarus and Company held June 27, 1928	162	119
B—Record of Directors' Meeting of F. & R. Lazarus and Company held June 27, 1928	164	120
C—Minutes of Special Meeting of Directors of F. & R. Lazarus and Company held June 28, 1928	167	123
Praecipe for Record	168	123
Clerk's Certificate [omitted in printing]	169	124
Orders Enlarging Time	169	124
Proceedings in U. S. C. C. A., Sixth Circuit	173	127
Minute entry of argument and submission	173	127
Decree	173	127
Opinion, Hicks, J	175	127
Clerk's certificate	182	133
Order allowing certiorari	183	135

1 Before United States Board of Tax Appeals

Docket No. 69481

THE F. AND R. LAZARUS AND COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Petitioner: H. A. Mihills, Esq., Robt. P. Goldman, Esq., Harry Stickney, Esq. For Respondent: P. M. Clark, Esq., S. B. Pierson, Esq.

Docket entries

1933

Jan. 23—Petition received and filed. Taxpayer notified. (Fee paid.)

Jan. 24—Copy of petition served on General Counsel.

Mar. 10—Answer filed by General Counsel.

Mar. 21—Copy of answer served on taxpayer—General Calendar.

1934

Feb. 28—Notice of appearance of Robert P. Goldman and Harry S. Stickney as counsel filed.

Feb. 28—Motion to place on the Circuit Calendar for hearing at Columbus or Cincinnati filed by taxpayer. 3/1/34 granted.

Mar. 19—Hearing set week of 4/30/34, Columbus, Ohio.

May 1—Hearing had before Mr. Seawell on merits—submitted. Dockets 69481 and 69750 consolidated for hearing and report. Depositions and exhibits admitted in evidence. Depositions of C. L. Converse and Fred Lazarus, Jr., filed. Petitioner's brief due June 19, 1934—reply July 29, 1934. Respondent's brief due 7/19/34.

2 May 14—Transcript of hearing of May 1, 1934, filed.

June 18—Motion for extension of 15 days to file brief filed by taxpayer. 6/19/34 granted to 7/5/34.

June 29—Brief filed by taxpayer. 6/30/34 copy served on General Counsel.

July 28—Brief filed by General Counsel.

Aug. 11—Motion for extension to Aug. 18, 1934, to file reply brief filed by taxpayer. 8/13/34 granted.

Aug. 14—Reply brief filed by taxpayer. 8/15/34 copy of brief served on General Counsel.

1935

May 17—Opinion rendered—Herbert F. Seawell, Division 4. Decision will be entered under Rule 50.

June 29—Notice of settlement filed by General Counsel.

July 2—Hearing set July 24, 1935, on settlement.

1935

July 23—Consent to settlement filed by taxpayer.
July 30—Decision entered—Division 15, Eugene Black.
Oct. 21—Petition for review by U. S. Circuit Court of Appeals, Sixth Circuit, with assignments of error filed by General Counsel.
Oct. 30—Cross petition for review by U. S. Circuit Court of Appeals, 6th Circuit, with assignments of error filed by taxpayer.
Oct. 30—Proof of service filed by taxpayer.
Oct. 31—Proof of service filed by General Counsel.
Oct. 31—Proof of service of petition for review filed by General Counsel.
Dec. 14—Motion for extension to 6/20/36 to complete and transmit record filed by General Counsel.
Dec. 14—Order enlarging time to 6/20/36 for preparation of evidence and delivery of record entered.
Dec. 28—Motion for extension to June 30, 1936, to complete and transmit record filed by taxpayer.
Dec. 28—Order enlarging time to June 30, 1936, for preparation of evidence and delivery of record entered.

1936

June 29—Motion for extension to Sept. 10, 1936, to complete and transmit record filed by taxpayer.
June 29—Order enlarging time to Sept. 10, 1936, to complete and transmit record entered.
July 8—Certified copy of order from 6th Circuit extending time to Sept. 1, 1936, to prepare evidence and transmit record filed. (Commissioner's appeal.)
Aug. 21—Motion for extension to 3/1/37 to prepare and transmit record filed by General Counsel.
Aug. 21—Order enlarging time to 3/1/37 to prepare and deliver record (Commissioner) filed.
Sept. 10—Motion for extension to March 10, 1937, to prepare statement and transmit record filed by taxpayer.
Sept. 10—Order enlarging time to 3/10/37 for preparation of evidence and delivery of record entered.

1937

Feb. 18—Motion for extension to Oct. 1, 1937, to complete and transmit record filed by General Counsel.
Feb. 20—Hearing set Feb. 24, 1937, on motion.
Feb. 24—Hearing had before Mr. Smith on motion of respondent for enlargment of time for preparation of evidence and transmission of record—argued—granted and enlarged to April 1, 1937, as to both parties.
Feb. 24—Order enlarging time to April 1, 1937, for preparation of evidence and delivery of record entered.
Mar. 18—Transcript of hearing of Feb. 24, 1937, filed.
Mar. 24—Agreed statement of evidence lodged by taxpayer.
Mar. 24—Agreed praecipe filed by taxpayer.

1937
Mar. 24—Agreed statement of evidence lodged by General Counsel.
Mar. 24—Agreed praecipe filed by General Counsel.
Mar. 26—Agreed statement of evidence approved and ordered filed (taxpayer).
Mar. 26—Agreed statement of evidence approved and ordered filed (Comm'r).
Mar. 29—Order enlarging time to April 15, 1937, for transmission and delivery of record entered (General Counsel).
Mar. 29—Order enlarging time to April 15, 1937, for transmission and delivery of record entered (taxpayer).

4 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 69750

THE F. AND R. LAZARUS AND COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Petitioner: H. A. Mihills, Esq., Robt. P. Goldman, Esq., Harry Stickney, Esq. For Respondent: P. M. Clark, Esq., S. B. Pierson, Esq.

Docket entries

1933
Feb. 6—Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 6—Copy of petition served on General Counsel.
Apr. 6—Answer filed by General Counsel.
Apr. 17—Copy of answer served on taxpayer—General Calendar.
1934
Feb. 28—Notice of the appearance of Robert Goldman and Harry Stickney, counsel for taxpayer, filed.
Feb. 28—Motion for circuit hearing in Columbus or Cincinnati, Ohio, filed by taxpayer. 3/1/34 granted.
Mar. 19—Hearing set for week of 4/30/34, Columbus, Ohio.
May 1—Hearing had before Mr. Seawell, Division 4, on merits. Depositions of C. L. Converse and Fred Lazarus, Jr., filed. Petitioner's brief due 6/19/34—Commissioner's brief due 7/29/34—petitioner's reply due 7/19/34.
May 14—Transcript of hearing May 1, 1934, filed.
5 June 18—Motion for 15 days extension to file brief filed by taxpayer 6/19/34 granted to 7/5/34.
June 29—Brief filed by taxpayer. 6/30/34 copy served.
July 28—Brief filed by General Counsel.
Aug. 11—Motion for extension to 8/18/34 to file reply brief filed by taxpayer. 8/13/34 granted.
Aug. 14—Reply brief filed by taxpayer. 8/15/34 copy served.

1935

May 17—Opinion rendered Mr. Seawell, Division 4. Decision will be entered under Rule 50.

June 29—Notice of settlement filed by General Counsel.

July 2—Hearing set July 24, 1935 on settlement.

July 23—Consent to settlement filed by taxpayer.

July 30—Decision entered—Mr. Black, Division 15.

Oct. 21—Petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by General Counsel.

Oct. 30—Cross petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by taxpayer.

Oct. 30—Proof of service filed by taxpayer.

Oct. 31—Proof of service filed by General Counsel.

Oct. 31—Proof of service filed by General Counsel.

Dec. 14 Motion for extension to 6/20/36 to prepare evidence and transmit record filed by General Counsel.

Dec. 14—Order enlarging time to June 20, 1936 to prepare and deliver record entered.

Dec. 28—Motion for extension to June 30, 1936 to complete and transmit record filed by taxpayer.

Dec. 28—Order enlarging time to June 30, 1936 for preparation and delivery of record entered.

1936

June 29—Motion for extension to 9/10/36 to prepare and transmit record filed by taxpayer.

June 29—Order enlarging time to 9/10/36 to prepare and deliver record entered.

July 8—Certified copy of order from 6th Circuit extending time to Sept. 1, 1936 to prepare evidence and transmit record filed (Commissioner's appeal).

Aug. 21—Motion for extension to 3/1/37 to prepare and transmit record filed by General Counsel.

6 Aug. 21—Order enlarging time to prepare and deliver record to 3/1/37 (Commissioner) entered.

Sept. 10—Motion for extension to March 10, 1937 to prepare statement and transmit record filed by taxpayer.

Sept. 10—Order enlarging time to 3/10/37 to prepare and deliver record entered.

1937

Feb. 18—Motion for extension to 10/1/37 to prepare and deliver record filed by General Counsel.

Feb. 20—Hearing set Feb. 24, 1937 on motion.

Feb. 24—Hearing had before Mr. Smith, Division 5, on respondent's motion for enlargement of time for preparation of evidence and transmission of record—argued and granted to 4/1/37—both appeals.

Feb. 24—Order enlarging time to 4/1/37 for preparation and delivery of record entered—both parties.

Mar. 18—Transcript of hearing 2/24/37 filed.

1937

Mar. 24—Agreed statement of evidence lodged by taxpayer.
Mar. 24—Agreed praecipe by taxpayer with proof of service thereon.
Mar. 24—Agreed statement of evidence lodged by General Counsel.
Mar. 24—Agreed praecipe filed by General Counsel—proof of service thereon.
Mar. 26—Agreed statement of evidence approved and ordered filed—taxpayer.
Mar. 26—Agreed statement of evidence approved and ordered filed—General Counsel.
Mar. 29—Order enlarging time to April 15, 1937 for transmission and delivery of record entered (General Counsel).
Mar. 29—Order enlarging time to April 15, 1937 for transmission and delivery of record entered (taxpayer).

7 Before United States Board of Tax Appeals

Petition—No. 69481

(Filed January 23, 1933)

The above-named petitioner hereby petitions for a redetermination of a deficiency set forth by the respondent in his notice of deficiency, IT:AR:C-4 OGR-60D, dated December 13, 1932, and as a basis of its proceeding alleges as follows:

(1) The petitioner is a corporation organized under the laws of the State of Ohio with its principal office at Town and High Streets, Columbus, Ohio.

(2) The notice of deficiency, a copy of which is attached and marked "Exhibit A," was mailed to the petitioner on December 13, 1932.

(3) The tax in controversy is income tax for the fiscal year ended January 31, 1930, and for approximately $9,100.00.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(A) The failure of the respondent to allow ordinary and necessary expenses, amounting to $20,000.00, as deductions in computing taxable net income for the alleged reason that these items constitute donations.

(B) The failure of the respondent to allow any deduction or depreciation of buildings, occupied by petitioner, in computing taxable net income for the alleged reason that depreciation follows the legal title to the property.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(A) Since 1906, the petitioner has operated a department store, which business was founded in Columbus, Ohio, by the Lazarus family in 1851.

(B) The population of Columbus in 1929 was approximately 300,000.

(C) The petitioner's store is the largest of its kind in the city.

(D) During the fiscal year ended January 31, 1930, the petitioner made cash payments to local organizations and institutions, which it regarded as being a profitable method of advertising and a contributing factor in the continued growth of its business, as follows:

Community Fund	$18,000.00
Salvation Army	1,000.00
White Cross Hospital	1,000.00
Total	$20,000.00

(E) These organizations, or institutions receiving benefits therefrom, had been patrons in previous years and continued to patronize the store during this fiscal year.

(F) The various individuals interested in the campaigns for funds for these organizations were good patrons of the petitioner and, in the opinion of the petitioner's management, considerable business would have been lost if these payments had not been made.

(G) Many of the employees of the petitioner had used some of the facilities of these organizations and the petitioner had reasons to believe that they would continue to use them.

(H) Prior to June 1, 1928, the legal title to the buildings, occupied by the petitioner during the fiscal year ended January 31, 1930, was recorded on the records of Franklin County, Ohio, in the petitioner's name.

(I) The cost of these buildings amounted to $2,467,952.57, as shown by petitioner's records.

(J) The annual depreciation on this investment, approved by the respondent, was 2½% or the amount of $61,698.14.

(K) As of June 1, 1928, the petitioner, in connection with some long-term financing, transferred the legal title of its buildings to a trustee, subject to a lease to the petitioner for a period of ninety-nine (99) years renewable forever, containing a purchase option, in consideration of the proceeds of the sale to registered holders of 3,250 land-trust certificates of equitable ownership, in The Lazarus Store Building Site, having a par value of $1,000.00 each.

(L) The indenture of lease between the trustee and the petitioner provides in general that all losses due to wear, tear, and exhaustion of the buildings are to be sustained by the petitioner and
9 that no damage to or destruction of the buildings or improvements on the premises, by fire or otherwise, shall entitle the petitioner to surrender possession of the leased premises or terminate the lease, thereby releasing the petitioner from its obligation to pay rent, taxes, or other charges during the period of the lease.

M) Under the terms of this indenture, the petitioner has agreed pay in addition to the trustee's charges, taxes, insurance, repairs, rations, improvements, and all other charges or assessments inst the premises during the period of the lease, a net rental icient to permit the trustee to make a distribution to the regis-d holders of five (5) percent of the par value of the certificates equitable ownership and also to create a Depreciation Fund, in sum of Two Million, Six Hundred Thousand Dollars ($2,600,-.00) by paying into such Fund, beginning September 1, 1928, the n of Sixteen Thousand, Two Hundred Fifty Dollars ($16,250.00) nually.

N) The indenture further provides that, in case the petitioner rcises its option to repurchase this real estate, the payments made the Depreciation Fund and the accumulated earnings thereon, d by the Trustee, are to be credited on the stipulated purchase ce.

O) The purchase option provides for the payment by the peti-ner to the Trustee of an amount sufficient to yield the following s, in addition to accrued rentals, for each certificate:

June 1, 1933, to May 31, 1938	$1,030.00
June 1, 1928, to May 31, 1948	1,020.00
June 1, 1948, to May 31, 2047	1,010.00

P) The fair market value of this real estate on June 1, 1928, the opinion of independent appraisers, was $6,509,552.00.

Q) Petitioner concurs with respondent in his decision that, for ome-tax purposes, payments made to the Depreciation Fund and umulations thereon during the fiscal year ended January 31, 1930, not allowable as deductions from income for the reason that this d may be allowed as a part of the repurchase price.

6) Wherefore, the petitioner prays that this Board may hear the proceeding and find:

(A) That payments made to the Community Fund, Salvation Army, and White Cross Hospital in the respective ounts of Eighteen Thousand Dollars ($18,000.00), One Thousand llars $1,000.00), and One Thousand Dollars ($1,000.00) were ordi-y and necessary business expenses and proper deductions from able income of the petitioner for the fiscal year ended January 1930.

B) That, since under the terms of the indenture of lease, the peti-ner is sustaining all losses due to wear, tear, and exhaustion of buildings, which it occupies under lease, and will continue to sus-n such losses, it is entitled to an annual allowance of $61,698.14 depreciation of buildings.

H. A. MIHILLS,
Counsel for Petitioner,
917 Munsey Building, Washington, D. C.

[*Duly sworn to by Simon Lazarus; jurat omitted in printing.*]

11 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, Dec. 13, 1932.

THE F. & R. LAZARUS AND COMPANY,
Town and High Streets, Columbus, Ohio.

SIRS: You are advised that the determination of your tax liability for the year(s) fiscal ended January 31, 1930, discloses a deficiency of $3,084.00, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; whereas, if this form is not filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

Inclosures:
Statement.
Form 882.
Form 870.

12 STATEMENT

IT:AR:C-4.
OGR-60D.

In re: The F. & R. Lazarus and Company, Town and High Streets, Columbus, Ohio

INCOME TAX LIABILITY

Fiscal year ended January 31, 1930, income tax liability, $125,613.77; income tax assessed, $122,529.77; deficiency, $3,084.00.

Reference is made to the report of the internal revenue agent in charge, Cincinnati, Ohio, covering your income tax liability for the fiscal year ended January 31, 1930, and to your protest dated July 28, 1931.

Careful consideration has been accorded your protest in connection with the agent's findings. The adjustments recommended by the agent have been approved by this office except the disallowance as a deduction from net income of a payment to the depreciation fund held by The Huntington National Bank, trustee for the real estate leased to The F. & R. Lazarus and Company.

Your contention that donations totaling $20,000.00 represent an ordinary and necessary business expense is denied in accordance with the provisions of article 262, Regulations 74.

Your contention relative to profit on sale of real estate has been allowed. It is held that the fair market value of preferred stock received in exchange for real estate was not in excess of the cost of the real estate.

Your contention relative to the deductibility of various items charged to reorganization expense has been allowed as ordinary and necessary expense.

Your contention relative to depreciation on a building has been disallowed, for the reason that it is held that the depreciation follows the legal title to the property which is not held by you. It is held that the payment to The Huntington National Bank, trustee for the real estate leased to The F. & R. Lazarus and Company for the so-called depreciation fund, in the amount of $17,062.50 is not an allowable deduction from income for tax purposes for the
13 reason that this fund may at some future time be allowed as a part of the repurchase price in accordance with the option to purchase, contained in the Indenture of Lease between The Huntington National Bank, trustee, and The F. & R. Lazarus and Company dated June 1, 1928, and for the further reason that the interest on funds so paid into the depreciation fund, and/or income from the securities into which such funds are invested, shall be added to the depreciation fund, and the taxpayer will continue to make such payments into the depreciation fund until this fund shall equal $2,600,000.00, after which time and so long as the principal amount in said fund shall equal said $2,600,000.00 and the taxpayer is not in default under the lease, the taxpayer shall be entitled to receive from the trustee, currently as received, the interest, and/or income from the depreciation fund, less any taxes, income or otherwise, which the trustee may be required to pay or withhold on account thereof. See Sol. Op. 86 in Cumulative Bulletin No. 4, page 138.

NET INCOME ADJUSTMENTS

Net income reported on return		$1,105,531.79
Add:		
1. Donations	$2,000.00	
2. Life-insurance premiums	16,727.24	
3. Profit on sale of land trust certificate	1,028.64	
4. Payment to depreciation fund	17,062.50	
		36,818.38
Total		$1,142,350.17
Deduct:		
5. Expense charged to reorganization expense		8,993.58
Correct net income		$1,133,356.59

EXPLANATION OF NET INCOME ADJUSTMENTS

1. Donations, $2,000.00, disallowed in accordance with the provisions of article 262, Regulations 74.

2. Life Insurance premiums, $16,727.24, disallowed in accordance with the provisions of article 283, Regulations 74.

14 3. Profit on sale of land trust certificates computed as follows:

Par value of land trust certificates owned January 31, 1929	$35,000.00
Cost	$32,750.00
Cost of each certificate, $1,000.00 face value	$ 935.71
Cost of $16,000.00 face value	$14,971.36
Selling price	16,000.00
Profit	$ 1,028.64

4. Payment to depreciation fund disallowed for the reasons as stated above.

5. Expense charged to reorganization expense, $8,993.58, allowed as a deduction from net income as an ordinary and necessary expense.

COMPUTATION OF TAX

Net income		$1,133,356.59
Income tax at 11%	$124,669.22	
Income tax at 12%	$136,002.79	
1/12 of tax at 11% for 1929		$ 114,280.12
1/12 of tax at 12% for 1930		11,333.65
Income tax liability		$ 125,613.77
Income tax assessed		122,529.77
Deficiency in tax		$ 3,084.00

Your claims for refunds of $1,995.00 and $9,830.03 have been given careful consideration and in view of the deficiency in tax set forth herein they will be rejected. In accordance with section 1103 (a) of the Revenue Act of 1932 official notice of the disallowance of your claims will be issued by registered mail.

A copy of this communication has been furnished your representatives, Ernst & Ernst, Munsey Building, Washington, D. C.

15 Before United States Board of Tax Appeals

Answer—No. 69481

(Filed March 10, 1933)

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this petitioner, admits and denies as follows:

1, 2, & 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (A) & (B). Denies the allegations of error contained in subdivision (A) and (B) of paragraph 4 of the petition.

5. (A) to (Q). Denies the allegations of fact contained in subdivisions (A) to (Q) inclusive of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal of the petitioner be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

16 Before United States Board of Tax Appeals

Petition—No. 69750

(Filed February 6, 1933)

The above-named petitioner hereby petitions for a redetermination of a deficiency set forth by the respondent in his notice of deficiency, IT: AR: C-4 JHL-60D, dated January 26, 1933, and as a basis of its proceeding alleges as follows:

(1) The petitioner is a corporation organized under the laws of the State of Ohio with its principal office at Town and High Streets, Columbus, Ohio.

(2) The notice of deficiency, a copy of which is attached and marked "Exhibit A," was mailed to the petitioner on January 26, 1933.

(3) The tax in controversy is income tax for the fiscal year ended January 31, 1931, and for approximately $9,700.00.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(A) The failure of the respondent to allow ordinary and necessary expenses, amounting to $19,166.67, as deductions in computing taxable net income for the alleged reason that these items constitute donations.

(B) The failure of the respondent to allow any deduction for depreciation of buildings, occupied by petitioner, in computing taxable net income for the alleged reason that depreciation follows the legal title to the property.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(A) Since 1906, the petitioner has operated a department store, which business was founded in Columbus, Ohio, by the Lazarus family in 1851.

(B) The population of Columbus in 1930 was approximately 300,000.

(C) The petitioner's store is the largest of its kind in the city.

(D) During the fiscal year ended January 31, 1931, the petitioner made cash payments to local organizations and institutions, which it regarded as being a profitable method of advertising and a contributing factor in the continued growth of its business, as follows:

Community Fund	$18,166.67
Salvation Army	1,000.00
Total	$19,166.67

(E) These organizations, or institutions receiving benefits therefrom, had been patrons in previous years and continued to patronize the store during this fiscal year.

(F) The various individuals interested in the campaigns for funds for these organizations were good patrons of the petitioner and, in the opinion of the petitioner's management, considerable business would have been lost if these payments had not been made.

(G) Many of the employees of the petitioner had used some of the facilities of these organizations and the petitioner had reasons to believe that they would continue to use them.

(H) Prior to June 1, 1928, the legal title to the buildings, occupied by the petitioner during the fiscal year ended January 31, 1931, was recorded on the records of Franklin County, Ohio, in the petitioner's name.

(I) The cost of these buildings amounted to $2,467,952.57, as shown by petitioner's records.

(J) The annual depreciation on this investment, approved by the respondent, was 2½% or the amount of $61,698.14.

(K) As of June 1, 1928, the petitioner, in connection with some long term financing, transferred the legal title of its buildings to a trustee, subject to a lease to the petitioner for a period of ninety-nine (99) years renewable forever containing a purchase option, in

consideration of the proceeds of the sale to registered holders of 3,250 land trust certificates of equitable ownership, in The Lazarus Store Building Site, having a par value of $1,000.00 each.

(L) The indenture of lease between the trustee and the petitioner provides in general that all losses due to wear, tear, and exhaustion of the buildings are to be sustained by the petitioner and that no damage to or destruction of the buildings or improvements
18 on the premises, by fire or otherwise, shall entitle the petitioner to surrender possession of the leased premises or terminate the lease, thereby releasing the petitioner from its obligation to pay rent, taxes, or other charges during the period of the lease.

(M) Under the terms of this indenture, the petitioner has agreed to pay in addition to the trustee's charges, taxes, insurance, repairs, alterations, improvements, and all other charges or assessments against the premises during the period of the lease, a net rental sufficient to permit the trustee to make a distribution to the registered holders of five (5) per cent of the par value of the certificates of equitable ownership and also to create a Depreciation Fund, in the sum of Two Million, Six Hundred Thousand Dollars ($2,600,000.00) by paying into such Fund, beginning September 1, 1928, the sum of Sixteen Thousand, Two Hundred Fifty Dollars ($16,250.00) annually.

(N) The indenture further provides that, in case the petitioner exercises its option to repurchase this real estate, the payments made to the Depreciation Fund and the accumulated earnings thereon, held by the Trustee, are to be credited on the stipulated purchase price.

(O) The purchase option provides for the payment by the petitioner to the Trustee of an amount sufficient to yield the following sums, in addition to accrued rentals, for each certificate:

June 1, 1933, to May 31, 1938	$1,030.00
June 1, 1938, to May 31, 1948	1,020.00
June 1, 1948, to May 31, 2047	1,010.00

(P) The fair market value of this real estate on June 1, 1928, in the opinion of independent appraisers, was $6,509,552.00.

(Q) Petitioner concurs with respondent in his decision that, for income tax purposes, payments made to the Depreciation Fund and accumulations thereon during the fiscal year ended January 31, 1931, are not allowable as deductions from income for the reason that this fund may be allowed as a part of the repurchase price.

(6) Wherefore, the petitioner prays that this Board may hear the proceeding and find:

19 (A). That payments made to the Community Fund and Salvation Army in the respective amounts of Eighteen Thousand One Hundred and Sixty-six Dollars and sixty-seven cents ($18,166.67) and One Thousand Dollars ($1,000.00) were ordinary and necessary business expenses and proper deductions from taxable income of the petitioner for the fiscal year ended January 31, 1931.

(B) That, since under the terms of the indenture of lease, the petitioner is sustaining all losses due to wear, tear and exhaustion of the buildings, which it occupies under lease, and will continue to sustain such losses, it is entitled to an annual allowance of $61,698.14 for depreciation of buildings.

H. A. MIHILLS,
Counsel for Petitioner,
917 Munsey Building, Washington, D. C.

[Duly sworn to by Simon Lazarus; omitted in printing.]

20 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, January 26, 1933.

THE F. & R. LAZARUS AND COMPANY,
Town and High Streets, Columbus, Ohio.

SIRS: You are advised that the determination of your tax liability for the year(s) fiscal ended January 31, 1931, discloses a deficiency of $10,349.43, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: C: P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; whereas, if this form is not filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner,
By J. C. WILMER,
Deputy Commissioner.

Inclosures:
Statement.
Form 882.
Form 870.

21 STATEMENT

IT:AR:C-4
JHI-60D

In re: The F. & R. Lazarus and Company, Town and High Streets, Columbus, Ohio

INCOME TAX LIABILITY

Fiscal year ended January 31, 1931, income tax liability, $127,135.75; income tax assessed, $116,786.32; deficiency, $10,349.43.

The deficiency shown herein is based upon the report dated May 21, 1932, prepared by Revenue Agent E. H. Morris and transmitted to you under date of May 26, 1932, which report is made a part of this letter.

Careful consideration has been accorded your protest dated January 11, 1933, in connection with the findings of the examining officer.

Your contention that donations totaling $19,166.67 represents an ordinary and necessary business expense is denied in accordance with the provisions of article 262, Regulations 74.

Your contention relative to depreciation on a building has been disallowed for the reason that it is held that the depreciation follows this legal title to the property which is not held by you. It is held that the payment to The Huntington National Bank, trustee for the real estate leased to The F. & R. Lazarus and Company for the so-called depreciation fund in the amount of $17,787.50 is not an allowable deduction from income for tax purposes for the reason that this fund may at some future time be allowed as a part of the repurchase price in accordance with the option to purchase. This adjustment is in conformity with prior years. See Solicitor's Opinion 86 in Cumulative Bulletin No. 4, page 138.

In view of the deficiency indicated above, your claim for refund ($7,403.86) will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932, official notice of the disallowance of your claim will be issued by registered mail.

22

Net income shown by return	$973,219.31
Add:	
1. Profit on sale of Land Trust Certificate	1,157.07
2. Life insurance premiums	14,752.12
3. Depreciation fund	17,787.50
4. Donations	52,548.60
Net income as adjusted	$1,059,464.60

EXPLANATION OF CHANGES

1. Sale price of certificates	$18,000.00
Cost of certificates	16,842.93
Profit	$1,157.07

2. Life insurance premiums on policies on which the company is the beneficiary are not an allowable deduction. Article 283, Regulations 74.

3. Depreciation fund	$16,250.00
Interest received	1,537.50
Total income	$17,787.50

4. Donations paid by a corporation are not allowed as a deduction in accordance with article 262, Regulations 74.

COMPUTATION OF TAX

Net income	$1,059,464.60
Income tax at 12%	$127,135.75
Previously assessed	116,786.32
Deficiency	$10,349.43

23 Before United States Board of Tax Appeals

Answer—No. 69750

(Filed April 6, 1933)

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this petitioner, admits and denies as follows:

1, 2, & 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (A) & (B). Denies the allegations of error contained in subdivisions (A) and (B) of paragraph 4 of the petition.

5. (A) to (Q). Denies the allegations of fact contained in subdivisions (A) to (Q), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal of the petitioner be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

24 Before United States Board of Tax Appeals

Opinion

Docket Nos. 69481, 69750. Promulgated May 17, 1935

1. The petitioner, in order to obtain funds on the security of its equities in improved real property occupied by it for the conduct of its business, conveyed the fee simple title thereto to a trustee. It also

assigned to the trustee in the same transaction its rights under 99-year leases, with option to purchase, covering property on which it had made improvements. Concurrently therewith the trustee leased the property conveyed to the petitioner for a term of 99 years, with right of renewal for like terms and an option to purchase at prices equal to the call prices of land trust certificates issued and sold by the trustee of a face amount equal to the amount received by the petitioner. It also sublet the leased property to the petitioner for a like term. The value of the property conveyed was twice the amount of the money received by the petitioner and the rent required to be paid by the terms of the lease was equal to 5 percent interest on such sum, an amount less than a fair rental for the property. Held, that the deed was in reality a mortgage, and that the transaction did not result in loss of petitioner's right to deductions for exhaustion of the property, which had a useful life less than the term of the lease.

2. Contributions made to several charitable institutions held not to be deductible as ordinary and necessary business expenses.

H. A. Mihills, C. P. A., Harry Stickney, Esq., and Robert P. Goldman, Esq., for the petitioner.

Philip M. Clark, Esq., and Stanley B. Pierson, Esq., for the respondent.

OPINION

SEAWELL: These proceedings were consolidated for hearing and report and involve the redetermination of deficiencies in income tax in the amounts of $3,084 and $10,349.43 for the fiscal years ending January 31, 1930 and 1931, respectively. The two issues involved relate to the right of the petitioner to take depreciation on
25 certain buildings it occupied during the taxable years under a 99-year lease, and to deduct as ordinary and necessary business expenses contributions to certain charitable institutions.

The petitioner, an Ohio corporation organized in 1851, operates the largest department store in Columbus, Ohio. In 1928 it was conducting its business in three buildings which it had previously constructed at an aggregate cost of $2,467,952.57. Two of the buildings were erected on ground then owned by the petitioner in fee, and the third building, erected in 1921 at a cost of $258,054.71, was constructed on ground held by the petitioner under a 99-year lease, with option to purchase, acquired in 1915. It also held another parcel of ground under a 99-year lease with option to purchase. In 1928 the petitioner, in a transaction involving the borrowing of money, gave to the Huntington National Bank of Columbus, trustee, a deed to the property it held in fee, and assignments of the property it held under 99-year leases. Concurrently with such conveyance and assignments, the trustee leased all of the property to the petitioner for 99 years, renewable for like periods, with an option to purchase the parcels to which it had title. In its returns for the

taxable years the petitioner claimed depreciation on the three buildings based upon a useful life of 40 years. The respondent disallowed the claimed deductions on the ground that the right to take depreciation on the property followed the legal title thereto. The petitioner insists that the deed was in reality a mortgage.

It is not essential that the taxpayer claiming a deduction for depreciation be the owner of legal title to the property. In Duffy v. Central R. Co. of New Jersey, 268 U. S. 55, the railroad company was allowed to take depreciation on property constructed by it on land occupied under a 999-year lease even though the lessor had title to the betterments, which had a useful life less than the remaining term of the lease. The purchaser of the interest in a 99-year lease is entitled to take depreciation on property erected on the land by the original lessee. Cogar v. Commissioner, 44 Fed. (2d) 554, reversing 16 B. T. A. 374. Cf. Military Equipment Co., 2 B. T. A. 36; Frank Holton & Co., 10 B. T. A. 1317. We have said that "The important question is not, in whom vests the fee or when it vested, but who made the investment of the capital which is to be recovered over a period of the exhaustion of the property. The one
26 who made the investment is entitled to its return." Gladding Dry Goods Co., 2 B. T. A. 336. In Rankin v. Commissioner, 60 Fed. (2d) 76, affirming 17 B. T. A. 1301, on the point, it was held that certain agreements were not leases with an option to purchase, but contracts of purchase, and Rankin was allowed to deduct amounts for depreciation on improvements made on the property. In its opinion the court said: "It is not necessary, in a case of this kind, that the taxpayer be the owner of the legal title. It is sufficient if it appears that his use or occupancy will exceed the life of the improvement."

It is well established that a deed, absolute in form, will be treated by a court of equity as a mortgage if it is executed as security for a loan of money. Peugh v. Davis, 96 U. S. 332; Coleman v. Miller, 8 Ohio, (Reprint) 179; Cotterell v. Long, 20 Ohio, 464; Bailey v. Poe, 120 Atl. (Md.) 242; Helmbold v. Helmbold, 158 N. E. (Ohio) 499; Obrecht v. Friese, 129 Atl. (Md.) 657. In doubtful cases, courts construe the transaction as a mortgage. Russell v. Southard, 53 U. S. 138. The right of the petitioner to take depreciation on the property in question turns upon whether the transaction occurring in 1928 created the relation of buyer and seller or lender and borrower.

In 1928 the petitioner had a mortgage of $1,700,000 outstanding on the property it owned in fee and owed slightly more than $1,500,000 for money borrowed on short-term notes, and sought means of spreading the obligations over a longer period of time. The only avenue open to it was the equities it had in its real property. A banking house in Chicago, the holder of petitioner's short-term notes, suggested a loan of $3,750,000 for 25 years at 5 percent interest secured by a mortgage on petitioner's real property, conditional upon the

purchase of the notes at 97.25 and the creation of a sinking fund, which, with interest on the loan and trustee expenses, would have involved an outlay of $210,000 per year. The Huntington National Bank of Columbus, one of petitioner's bankers for about 15 years, suggested a loan of $3,500,000 at 5 percent based upon the issuance of land trust certificates on petitioner's real property at a price of 96.75, and the creation of a sinking fund for repayment of the loan. The proposal of the Huntington National Bank of Columbus, limited to $3,250,000 in amount, was accepted by the petitioner because the loan to be made under it was self-liquidating.

27 The transaction was closed in this manner: The petitioner executed and delivered to the Huntington National Bank of Columbus, trustee, a deed to the parcels of property it held in fee and assignments of the 99-year leases it held for the remaining property, and concurrently therewith the trustee leased the property to the petitioner for a term of 99 years, with an option of renewal for like terms and to purchase at specified prices, and executed a declaration of trust between itself and holders of the land-trust certificates relating to the issuance of 3,500 certificates, each of the face amount of $1,000. Of the 3,500 certificates, 250 were held in reserve pending the exercise of the option to purchase the parcels covered by the 99-year leases assigned to the trustee by the petitioner. The sum of $3,159,687.50 ($3,250,000 less discount of 3.25 percent) was received by the petitioner from the Huntington National Bank of Columbus under the transaction. This sum was used by the petitioner to take up its mortgage on the property and short-term notes. The release of the mortgage, the deed to the trustee, and the declaration of trust were recorded consecutively on June 28, 1928.

The lease from the trustee to the petitioner provides, among other things, for annual rentals during the term of the lease based upon an annual return of 5 percent on $3,250,000 that the lessee shall create a depreciation fund and make quarterly payments to the trustee for deposit therein until the fund reaches the sum of $2,600,000, and that such obligation may be satisfied by the delivery of cash, land trust certificates issued under the declaration of trust, or obligations of the United States; that the lessor shall pay interest on the amounts deposited in such fund, provided that any amounts may be, at the request of the petitioner, invested in obligations of the United States or certificates issued by the trustee under its declaration of trust; that the lessee shall have the option to purchase the lessor's interest in the property for $3,605,000 between June 1, 1933, and May 31, 1938; for $3,570,000 between June 1, 1938, and May 1, 1948; for $3,535,000 after June 1, 1948, plus, in each case, accrued rentals to the date of purchase; that in case the option to purchase is exercised there shall be credited on the purchase price (1) all amounts then in the hands of the lessor as trustee not otherwise due for distribution under the terms of the trust agreement with the

28 certificate holders, (2) any amounts in the hands of the lessor

received as compensation for the appropriation to public use of any part of the premises, (3) the amount of cash in the depreciation fund, including the net proceeds of any securities other than land-trust certificates, and the option price of any land-trust certificates held in the depreciation fund, and (4) the net unappropriated proceeds of any insurance; that the lessee shall pay all taxes and other charges on the depreciation fund; that in case the lessee fails to exercise the option to purchase or the lease is terminated on account of defeault of the lessee, the depreciation fund shall become the property of the lessor as liquidated damages on account of depreciation in value of the premises; that in case of condemnation of a substantial portion of the premises the lessee shall exercise the option given it to purchase; that there shall be no dimunition of rent in case of condemnation or loss by fire of any portion of the premises; and that the lessee shall pay all taxes and insurance on the property and keep it in good condition, order, and repair.

The land-trust certificates were sold to the public at $1,010 to yield a return of 4.95 percent. The certificates recite, among other things not important here, that the holder is the owner of a portion, stated in 3,500ths, "of the equitable and beneficial interest" in the real property under lease to the petitioner; that the trustee will account to the registered owner of the certificate quarterly for the owner's proportionate share of the trust estate or the net proceeds thereof; and that the certificate is subject to all of the terms of the declaration of trust under which it was issued.

The declaration of trust executed by the trustee, in addition to the terms of the certificates as set forth in the preceding paragraph, recites the terms of the option to purchase given the petitioner under the lease; that the certificates are subject to call at prices ranging from $1,010 to $1,030, depending upon the period during which the right is exercised, plus an adjustment for accrued rentals; that in the event the property is sold distribution of the net proceeds shall be made among the holders of the certificates; that the duties of the trustee shall be restricted to the collection of rent from the trust estate and the distribution of the net proceeds thereof to the certificate holders; and that the holders of the certificates shall have no right to call for a partition of the trust estate.

29 From the undisputed testimony in the record it is clear that the petitioner's desire was to obtain a long-term loan on the security of its real property, with provision for reacquisition of unencumbered title. It was not interested in selling the property to raise the needed funds. The petitioner then considered the property conveyed to be worth around $6,000,000 and it would not have sold it for $3,250,000, the face amount of the trust certificates actually sold. The representative of the bank in the transaction testified that he did not consider that the bank was buying the property, and that the deal was merely one involving a loan with ample security. The bank had the property appraised to determine not whether the

property was worth $3,250,000 to it as a buyer, but to establish the value of the land and improvements for loan purposes. The appraisal made by qualified appraisers established a value of $3,453,125 for the land and $3,056,427 for the improvements as of the time of the transaction.

The transaction was carried out in the form described instead of by a mortgage loan because of the lack of a market at that time for mortgage notes. The annual rentals were fixed on the basis of a 5 percent return on the face amount of the outstanding certificates, an amount established by evidence to be less than a fair rental. This tioner recognized by making a rent charge of $375,000 in its books each year for the property. The option price of the property held in fee was fixed at an amount equal to the call price of the outstanding certificates and the amount of the quarterly payments into the depreciation fund is sufficient to retire all of the certificates within 48½ years at the call prices thereof. Up to this time the petitioner has been able to meet the requirements of the fund with certificates purchased in the open market at less than the call prices and now has on hand certificates of a face amount sufficient to meet its depreciation fund obligations for sixteen years. The petitioner desired to have the lease provide for a depreciation fund equal to the option price of the property, but it was limited to $2,600,000 in the lease in order to bring the transaction within a certain ruling of the Attorney General of Ohio.

From a consideration of all the evidence we conclude that the deed given was in reality a mortgage, and that the transaction was not one in which the petitioner lost its right to deductions for exhaustion of the property conveyed. The right of the petitioner to exhaustion on the improvements it made in 1921 on the property then occupied by it as the original lessee under a 99-year lease is controlled by Duffy v. Central R. Co. of New Jersey, supra. These holdings are not contrary to Weiss v. Wiener, 279 U. S. 333. In that case, as the court pointed out in Cogar v. Commissioner, supra, Weiner took the lease with the buildings and had no investment in the property to recover.

Of the qualified witnesses produced by the petitioner to express an opinion on the point, one testified that the property in question had a useful life of from 40 to 50 years; another, 45 *ot* 50 years; another 40 years; and the fourth, 60 years. From their testimony we find that the property has a life of 50 years for depreciation purposes. Exhaustion will be computed at the rate of 2 percent per annum on a cost basis of $2,467,952.57.

The petitioner's vice president and treasurer, Fred Lazarus, Jr., assisted in the organization of the Columbus Community Fund. He has always actively participated in its affairs and been a member of its executive committee, and with another individual was responsible for obtaining the larger contributions to the fund. About 50 agencies derive their funds from the Columbus Community Fund.

During the taxable years the petitioner employed between 1,400 and 1,600 employees and was either the largest or the second largest employer of labor in Columbus, a city having a population of about 300,000. It employed two full-time nurses and had a physician subject to call.

A survey made in 1928 by the Columbus Community Fund disclosed that about 20 percent of the petitioner's employees or members of their families were in active contact with social and health agencies deriving their funds from the Columbus Community Fund. Surveys made relating to employees of an undisclosed number of other concerns engaged in various kinds of business disclosed that not less than 15 percent of the employees of any concern were receiving benefits from such agencies. Of a group of 199 employees of petitioner investigated by the Columbus Community Fund in 1928, 35 of them or members of their families were known to the family welfare agencies of the Columbus Community Fund. Of these, 17 were known to the agencies in the health group, 4 to such agencies and the family care group, 3 to the health group and the protective and corrective group, 1 to the health and family groups and also to agencies of the protective and corrective group, and 7 to the family care group. These agencies do not include neighborhood houses, character building or recreational organizations, or hospitals, except the Children's Hospital and White Cross Hospital. Contributions to the fund were solicited from employers of labor on the basis of the results shown by these investigations.

31

The facilities and services of the organizations supported by the Columbus Community Fund were available to all citizens of Columbus, no preference being given employees of the petitioner.

The Columbus Community Fund considered $10 per employee to be the minimum amount concerns in Columbus should contribute under normal business conditions. The amount was subsequently increased to take care of additional demands upon the agencies deriving their income from the fund. During the taxable year the petitioner made the following contributions to the organizations shown:

	1930	1931
Columbus Community Fund	$18,000	$18,166.67
Salvation Army	1,000	1,000.00
White Cross Hospital	1,000	1,000.00

The petitioner believed that the agencies of the Columbus Community Fund, the White Cross Hospital, and the Salvation Army of Columbus helped make the city a better place in which to live, thereby increasing its opportunities for business, and that by showing its willingness to bear its share of the cost of such work it created the good will of its customers. The petitioner made no special effort to obtain publicity in connection with its contributions. Its contributions to the agencies have always been among the largest in the community, and because of that fact they received a considerable amount of publicity. The petitioner was also of the opinion that

failure to make contributions to these agencies would have resulted in loss of patronage from enthusiasts of social-service work of the kind being conducted by the agencies.

Article 264 of Regulations 74 provides that:

Donations made by a corporation for purposes connected with the operation of its business, * * * when limited to charitable institutions conducted for the benefit of its employees or their
32 dependents are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income.

Under these regulations, which have the force of law, the petitioner must show a direct benefit to its employees or business in order to be entitled to deduct the donations in question as an ordinary and necessary business expense. Old Mission Portland Cement Co. v. Helvering, 293 U. S. 289.

The petitioner claims to be within the statute on the ground that its employees received some benefit from the services of the agencies deriving their operating funds from the organization to which the contributions were made and that failure to make payments would have resulted in serious loss to its business.

An investigation conducted in a prior year disclosed that some of the petitioner's employees and members of their families had taken advantage of the facilities of some of the various charitable and other agencies receiving support from the Columbus Community Fund. Whether the same situation prevailed in the taxable years does not appear, but the argument of counsel assumes that it did. The nature of the petitioner's business is such that it required the services of persons of various types and walks of life and it is not regarded as unusual that out of a large group a portion should, of necessity or otherwise, seek the benefits of welfare agencies. The contributions made by the petitioner did not give its employees any better standing before the various organizations receiving support from the Columbus Community Fund than other citizens of the community, and it does not appear that a contribution by the employer of an applicant for help, if employed, was a prerequisite to the rendition of assistance. The petitioner's vice president and treasurer had played a prominent part in the affairs of the Columbus Community Fund since its inception, and the petitioner considered itself under a moral obligation to contribute to a cause receiving the active public support of one of its high officers. Obviously, there could have been no division of sentiment. In making the contributions, we think the petitioner was motivated by philathropic rather than business reasons.

The petitioner did not seek the publicity its contributions
33 received. While failure to contribute would have resulted, as Fred Lazarus, Jr., testified, in loss of patronage of "a good many people who are almost fanatical on the subject of social service of this kind," it may be that some loss of business occurred from par-

ticipation in the creation of the fund, for there are at times critics of the best of good deeds and wide difference of opinion as to how funds for charitable purposes should be raised and spent. It also may be true that the petitioner had patrons who believed that it should have contributed a larger amount and refrained from dealing with petitioner on account of their views. Contributions made to charitable institutions for the purpose of avoiding criticism or ill will are not deductible as ordinary and necessary business expenses. W. M. Ritter Lumber Co., 30 B. T. A. 231 (271); in which contributions claimed to be deductible were made to the Columbus Community Fund.

The petitioner cites a number of cases as authority for sustaining its claim, but relies chiefly on Evening Star Newspaper Co., 28 B. T. A. 762. In that case, as was pointed out in W. M. Ritter Lumber Co., supra, the existence of the petitioner was dependent upon the "general opinion and esteem of the public within its circulation radius." No such fact exists here.

Claims of the sort involved here are controlled by their peculiar facts. Old Mission Portland Cement Co. v. Helvering, supra. From the evidence here we are unable to find as a fact that the contributions resulted in any direct benefit to petitioner's employees or its business, and, accordingly, sustain the action of the respondent in refusing to allow the several amounts as ordinary and necessary business expenses.

Decision will be entered under Rule 50.

[SEAL]

34 Before United States Board of Tax Appeals

Decision—No. 69481

(Entered July 30, 1935)

Pursuant to the opinion of the Board promulgated May 17, 1935, the respondent on June 29, 1935, having filed notice of settlement under Rule 50, and the petitioner on July 23, 1935, having filed notice of acquiescence to the proposed computation, it is

Ordered and decided: That there is an overpayment in income tax in the amount of $2,386.70 for the fiscal year ended January 31, 1930.

[SEAL] (S) EUGENE BLACK, *Member.*

Before United States Board of Tax Appeals

Decision—No. 69750

(Entered July 30, 1935)

Pursuant to the opinion of the Board promulgated May 17, 1935, the respondent on June 29, 1935, having filed notice of settlement

under Rule 50, and the petitioner on July 23, 1935, having filed notice of acquiescence to the proposed computation, it is

Ordered and decided: That there is a deficiency in income tax in the amount of $4,426.35 for the fiscal year ended January 31, 1931.

[SEAL] (S) EUGENE BLACK, *Member.*

Before United States Board of Tax Appeals

Petition for review and assignments of error—Nos. 69481 and 69750

(Filed October 21, 1935)

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Phillip M. Clark, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That petitioner on review hereinafter referred to as the Commissioner is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, appointed and holding his office by virtue of the laws of the United States; that respondent on review is a corporation organized under the laws of the State of Ohio, having its principal place of business in the city of Columbus, Ohio; that the income tax returns of the said corporation for the fiscal years ended January 31, 1930, and January 31, 1931, were made to the collector of Internal Revenue for the Eleventh District of Ohio whose office is located in Columbus, Ohio, which is within the jurisdiction of the United States Circuit Court of Appeals for the Sixth Circuit.

II

The nature of the controversy involved is the correct determination of corporation income taxes for the fiscal years ended January 31, 1930, and January 31, 1931.

The Commissioner determined deficiencies in corporation income taxes against the F. and R. Lazarus and Company for the fiscal year ended January 31, 1930, and January 31, 1931, in the amounts of $3,084.00 and $10,349.43, respectively. On December 13, 1932, the Commissioner in accordance with the provisions of Section 272 of the Revenue Act of 1928 sent by registered mail a notice of said deficiency for the fiscal year ended January 31, 1930, in the amount as hereinbefore set forth and on January 26, 1933, the Commissioner in accordance with the provisions of Section 272 of the Revenue Act

of 1928 sent by registered mail a notice of said deficiency for
36 the fiscal year ended January 31, 1931, in the amount as hereinbefore set forth. Thereafter, on January 23, 1933, The F. and R. Lazarus and Company pursuant to the provisions of Section 272 of the Revenue Act of 1928 filed a petition with the United States Board of Tax Appeals for the fiscal year ended January 31, 1930, seeking a redetermination of the deficiency for said year, this petition being assigned Docket No. 69481. Thereafter, on February 6, 1933, The F. and R. Lazarus and Company pursuant to the provisions of Section 272 of the Revenue Act of 1928, filed a petition with the United States Board of Tax Appeals for the fiscal year ended January 31, 1931, seeking a redetermination of the deficiency for said year, this petition being assigned Docket No. 69750. On May 17, 1935, the Board of Tax Appeals promulgated its findings of fact and opinion in these appeals and on July 30, 1935, the Board of Tax Appeals entered its final orders of redetermination wherein and whereby it was ordered and decided that there is an overpayment for the fiscal year ended January 31, 1930, in the amount of $2,386.70 and a deficiency in income tax for the fiscal year ended January 31, 1931, in the amount of $4,426.35.

The deficiencies as determined by the Commissioner resulted in part from his holding that the taxpayer had sold the property in the year 1928 upon which depreciation was claimed in the fiscal years ended January 31, 1930 and January 31, 1931, without retaining such an interest therein as to entitle it thereafter to take deductions for depreciation after the year 1928. The Board of Tax Appeals in its opinion held that the transaction in 1928 was not one in which the petitioner lost its right to deductions for exhaustion of the property conveyed.

A review of the United States Circuit Court of Appeals for the Sixth Circuit of such decision is sought herein.

III

Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final orders of redetermination rendered and entered by the Board of Tax Appeals manifest errors occurred and intervened to the prejudice of the Commissioner and the Commissioner assigns the following errors and each of them which he avers occurred in said record, proceedings, findings of fact, decision and final orders of rede-
37 termination, and upon which he relies to reverse the said decision and final orders of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred under the facts in this case as embodied verbatim in its findings of fact and opinion in finding, holding, and redetermining, that the respondent on review accom-

plished a mortgage of its real property in 1928 and not a sale thereof.

2. The Board of Tax Appeals erred under the facts in this case as embodied verbatim in its findings of fact and opinion in failing and refusing to find, hold, and redetermine that the respondent on review accomplished a sale of its property in the year 1928.

3. The Board of Tax Appeals erred in holding that the respondent on review was entitled to a deduction for depreciation in each of the fiscal years ended January 31, 1930, and January 31, 1931.

4. The Board of Tax Appeals erred in failing and refusing to find, hold, and redetermine that the respondent on review was not entitled to a deduction for depreciation in the fiscal years ended January 31, 1930, and January 31, 1931.

5. The Board of Tax Appeals erred in holding that the transaction in 1928 was not one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed.

6. The Board of Tax Appeals erred in failing and refusing to find, hold, and redetermine that the transaction in 1928 was one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed.

7. The Board of Tax Appeals erred in its order of redetermination for the fiscal year ended January 31, 1930, in holding that there was an overpayment in income taxes for said fiscal year in the amount of $2,386.70.

8. The Board of Tax Appeals erred in its order of redetermination for the fiscal year ended January 31, 1931, in holding that there was a deficiency in income taxes in the amount of $4,426.35, for said fiscal year.

9. The Board of Tax Appeals erred in failing and refusing to approve the deficiencies for the fiscal years ended January 31, 1930, and January 31, 1931, respectively, as determined by the Commissioner.

10. The Board of Tax Appeals erred in its conclusions of law set forth in the opinion herein. Such conclusions were not re-
38 sponsive to its findings of fact and were contrary to and not supported by the evidence presented.

11. The Board of Tax Appeals erred in that there is neither in the findings of fact by the Board nor in the opinion by the Board any findings of fact to sustain the Board's conclusion of law as set forth in the Board's opinion and decision.

12. The Board of Tax Appeals erred in that the opinion and decision of the Board based upon the Board's finding of fact are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Sixth Circuit and that a transcript of record be prepared in accordance with law and the rules of said court and transmitted to the clerk of said court for

filing and that appropriate action be taken to that end that the errors complained of may be reviewed and corrected by said court.

(Signed) ARTHUR H. KENT,
Assistant Attorney General,
(Signed) ROBERT H. JACKSON,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:
PHILIP M. CLARK,
Special Attorney,
Bureau of Internal Revenue.

Duly sworn to by Philip M. Clark; jurat omitted in printing.

39 Before United States Board of Tax Appeals

Notice of filing petition for review—Nos. 69481 and 69750

(Filed October 31, 1935)

To THE F. AND R. LAZARUS AND COMPANY,
Town and High Streets, Columbus, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of October 1935, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of October 1935.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel,
for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 24th day of October, 1935.

(Signed) THE F. AND R. LAZARUS & CO.,
(Signed) ROBERT LAZARUS, *Vice Pres.*,
Respondent on Review.

40 Before United States Board of Tax Appeals

Notice of filing petition for review—Nos. 69481 and 69750

(Filed October 31, 1935)

To H. A. MITCHELL, ESQ.,
Munsey Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of October 1935, file with the Clerk of

the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 21st day of October 1935.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel,
for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 21st day of October 1935.

(Signed) H. A. MIHILLS,
Attorney for Respondent on Review.

41 Before United States Board of Tax Appeals

Statement of evidence—Nos. 69481 and 69750

(Filed March 26, 1937)

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Herbert F. Seawell, Member of the United States Board of Tax Appeals, at Columbus, Ohio, on May 1, 1934. H. A. Mihills, C. P. A., Robert Goldman, Esq., and Harry Stickney, Esq., appeared for the taxpayer, and Robert H. Jackson, Assistant General Counsel, Bureau of Internal Revenue, and Philip M. Clark and Stanley B. Pierson, Special Attorneys, Bureau of Internal Revenue, appeared for the Commissioner.

The two Docket numbers were consolidated for hearing and decision before the Board; however, separate decisions were entered by the Board.

The testimony of C. L. Converse and Fred Lazarus, Jr., witnesses produced on behalf of the petitioner, was taken by deposition; these depositions including both the testimony on direct and cross-examination, together with the documents introduced as part thereof were offered and received in evidence at the hearing.

C. L. CONVERSE, whose deposition was thus introduced by and on behalf of the taxpayer, testified as follows:

DIRECT EXAMINATION

I live at 27 Hoffman Avenue, Columbus, and have been a resident of Columbus since 1903. I am and have been since 1905 a real-estate broker and have bought and sold real estate during that time. For the last twenty years downtown property has been my specialty. I

have been called upon at times to make appraisals of downtown business property and my lease records used in connection with my appraisals are I think the most complete in the City of Columbus. I do not have access to other records of sales and leases in Columbus, but consider that my own records give a complete picture of the transactions taking place in downtown real estate. Except in one instance I have not been engaged in the appraisal of property for the Federal Government. I have worked as appraiser for the Midland Mutual Life Insurance Company since 1921 doing all of their appraisal work in this district. There have been very many sales or long term lease transactions in downtown Columbus real estate in or about 1928.

42 In 1928 I was engaged as one of the members of an appraisal committee to appraise the property of The F. and R. Lazarus and Company for the Huntington National Bank and in connection with that appraisal used my lease records in my office including transactions from 1910 to 1928. The transactions in downtown Columbus in or about that time, which stand out in my mind as among the more important were a lease by Mr. Kresge at the northwest corner of State and High, lease and cash between $22,000 and $22,500 a foot and the corner of the alley immediately north of the Lazarus property taken by the McCrory Stores at $22,000 a foot, one small parcel in there on the east side of the street with a shallow depth at $15,000 a foot.

The other members of the committee engaged by the Huntington National Bank in 1928 were Mr. Fred Vercoe and Mr. Wendell Beggs. We spent practically a week's time considering values of the Lazarus properties, the members of the committee discussing the matter during that time. The F. and R. Lazarus and Company store which was appraised in 1928 was at the northwest corner of Town and High Streets and the northeast corner of Town and Front Streets. One factor of value considered in reaching the opinion of value submitted to the bank in 1928 was the leases and sales that had been made immediately prior to the appraisal that we made at that time. My opinion of value was predicated somewhat on my long years of experience in the real estate business. In deciding the value of the buildings we secured the cubic footage of the buildings using the ordinary reports as to cost of construction and compared those figures with the contractors of Columbus as to cost at that time, making an actual inspection of the properties. The building on Front Street was just finished at that time but as to the building on High Street we gave consideration to accrued depreciation. A written report as to the valuation of the land and buildings occupied by the taxpayer was submitted to the bank. The opinion of value as expressed by the committee also represented my personal opinion.

Whereupon a photostatic copy of an appraisal report dated June 13, 1928, addressed to the Huntington National Bank bearing deponent's signature was offered in evidence and marked "Petitioner's

Exhibit No. 1." (Copy attached hereto and made a part hereof.)

43 The deponent further testified:

An item of $250,000 subtracted from the total land value in Petitioner's Exhibit No. 1 was the cost of the fee of part of the High Street frontage under 99-year lease and was therefore deducted. In reaching our conclusion as to the land value in 1928 on the High Street frontage the price per foot used was $16,000.00. We worked on corner influence tables and all the usual methods that appraisers use in arriving at that value. The corner is worth more that the inside property and that was taken into consideration and then figured as a whole. In this regard I am speaking of parcel No. 1, High Street. On parcel No. 2 the same system was used, corner influence, I think $3,500.00 was the base figure and corner influence brought it up to something over $700,000.00, not quite $4,000 a foot. We called contractors as to the cost of construction of that type of building at that time as well as used Dodge reports and made use of those figures. As to the buildings other than the new building we used the cost of construction at that time and made a deduction of 28% for depreciation for the years the building had been standing. The buildings occupied by the Lazarus Company appraised in 1928 are of modern fireproof construction, concrete and brick, reinforced concrete and brick, elevators. I have made an investigation of the property with a view to determining its probable useful life and in my opinion the buildings erected by Lazarus appraised in 1928 are good for sixty years. In reaching such a conclusion I have given consideration to the continued occupancy of that same building by the present tenant and have considered the obsolescence factor in connection with the estimated life but obsolescence in store rooms is limited in a town the size of Columbus. You can change fronts readily and without much expense. In New York or Chicago they tear them down anywhere from two to twenty years of age but in a city the size of Columbus we do not. We don't grow that rapidly to need the tearing down of good buildings. I would consider the maximum life of this building to be sixty (60) years, that would be my thought on it, just my individual opinion. In my opinion the rental value of the Lazarus property, the entire property for one tenant such as Lazarus who had been in business for many, many years was at least $30,000.00 a month or $360,000.00 a year. I haven't figured out the value of the leasehold estate on that

44 basis. It was stated the purpose of the appraisal made in 1928 was for land-trust certificates. In my opinion the value of the leasehold would be the difference between the appraised value and whatever the land-trust certificate issue was. I don't remember the exact amount of the land-trust certificate issue. It was from 3,000,000 to three and one-half million. My opinion of the value of that lease would be the difference between the amount of land-trust certificate issue and our appraised value of $6,509,552.00.

I have been a member of the Columbus Real Estate Board since its organization. This Board is a member of the National Association and the Ohio Association of Real Estate Boards. I have served on numerous committees of the National Association and have been secretary of the State Association two times and president once. I have always been active in the Columbus real-estate board, have been a member of their appraisal committee for at least 15 years, and am at present president of the Columbus Real Estate Board. Mr. Wendell Beggs has been a member of the appraisal committee of the real-estate board for many, many years. Mr. Vercoe is not a real-estate man.

There was no cross-examination.

FRED LAZARUS, Jr., whose deposition was thus introduced by and on behalf of the taxpayer, testified as follows:

DIRECT EXAMINATION

I, live in Columbus, Ohio, and have been a resident there since my birth (illegible) years ago. I am a merchant, vice president and treasurer of the F. and R. Lazarus and Company, president of the John Shillito Company, a subsidiary of The F. and R. Lazarus and Company, doing business in Cincinnati, Ohio. I am a member of the committee on Operations of the Federated Department Stores, wh'ch is a holding company holding the majority of the common stock of The F. and R. Lazarus and Company, William Filene Sons Company of Boston, Bloomingdale Company of New York, and the Abraham and Straus Company of Brooklyn. I have been engaged in the retail department store business about 30 years and have been vice president and treasurer of the F. and R. Lazarus and
45 Company since its incorporation, which I think is 27 years. In comparison with other department stores in Columbus, The F. and R. Lazarus and Company is by far the largest. I handle the finances of The F. and R. Lazarus and Company and have done so for 27 years. I handled its financing in the year 1928. In the early part of 1928 we had completed about a year and a half previously a large addition to our building in Columbus at a cost of about $2,000,000.00. In order to finance that improvement we had borrowed from the Northwestern Life Insurance Company, $1,700,000.00 on a 10-year mortgage at 5% interest, which mortgage was dated in 1926. In June 1928 we purchased the controlling stock of the John Shillito Company at slightly more than a million and a half dollars. This was financed by issuing short-time notes that we sold to note brokers, A. G. Becker and Company, who have been of long service to us in financial matters; those were six-months notes. When we came to May and June of 1928 I felt and so did the board of directors, that we had much too much floating debt and we sought some basis of financing where this would not be a current liability. Becker and Company are a Chicago investment and banking house.

Whereupon a copy of the minutes of a special meeting of the board of directors of The F. and R. Lazarus and Company, called for Monday, May 28, 1928, was offered in evidence and marked "Petitioner's Exhibit No. 2." (Copy attached hereto and made a part hereof.)

The deponent further testified:

As soon as our tentative arrangements with Shillito were completed, I took up with the Huntington National Bank and with A. G. Becker and Company what means they could suggest for permanent financing. In the judgment of all of us the only form it could take was the financing on the equities which we held in our real estate. The Huntington National Bank is of Columbus, Ohio, and has been our banker for quite a number of years. A. G. Becker and Company suggested that they lend us $3,750,000.00 on the basis of a 25-year mortgage at 5% and that they would buy our mortgage notes at 97¼. They said that they take this on the basis of a sinking fund and trustees expense involving $22,500.00 a year. The interest would be $187,500.00 a year or a total outlay for us of $210,000.00. Those discussions with Becker and Company took a few weeks.

46 My discussions at the Huntington National Bank were with Mr. Gwynne Huntington, then vice president of the bank, now president, and Mr. Lowry Sweney, the manager of the bond department. They stated that mortgage notes were not practical to sell in Ohio, largely because of the Ohio law. They suggested a fee certificate issue, so-called land-trust issue in Ohio, whereby they would advance us three and one-half million dollars at 5% on repayment of one-half of one per cent a year and a small trust fee, I think, amounting to $\frac{1}{10}$ of one per cent. The price was 96¾; in other words they wished a discount of 3¼%. We accepted the Huntington proposition because it was self-liquidating, because the other proposition was not self-liquidating. Under the sinking-fund arrangement of the Becker proposition we would have had to repay at the end of 25 years or refinance at that time an amount between two and a half million or two and three-fourths million dollars. Under the Huntington proposition the repayment of one-half of one per cent to the sinking fund under the so-called land-trust plan would permit this loan to extinguish itself in 48½ years. Our objection to refinancing at the end of the 25 years was that we believed we would be asking a new generation, probably in management at that time to take on, certain burdens which we had caused the business by our own decisions. Mr. Sweney, of the Huntington National Bank, prepared a schedule of land-trust retirement figures, which he gave me before I closed with him.

Whereupon a schedule of land-trust retirement figures were offered in evidence and marked "Petitioner's Exhibit No. 3." (Copy attached hereto and made a part hereof.)

The deponent further testified:

A letter of June 5, signed by Lowry Sweney, to The F. and R. Lazarus and Company, attention Mr. Fred Lazarus, Jr., which is

shown me and some pencil notes on there is the proposition of the Huntington National Bank to do this financing for us. The pencil notes are mine in my handwriting.

Whereupon the letter relative to which deponent testified was marked "Petitioner's Exhibit No. 4." (Copy attached hereto and made a part hereof.)

Whereupon the deponent further testified:

47 A letter of June 7, signed by Mr. Lowry Sweney and also by The F. and R. Lazarus and Company by Mr. Fred Lazarus, Jr., Treasurer, shown me is the contract to enter into the lease agreement between the Huntington National Bank and ourselves with reference to the land-trust certificate issue.

Whereupon the letter relative to which deponent testified was offered in evidence and marked "Petitioner's Exhibit No. 5." (Copy attached hereto and made a part hereof.)

Whereupon the lease executed between the Huntington Bank of Columbus as trustee, and The F. and R. Lazarus and Company, duly identified, was offered in evidence and marked "Petitioner's Exhibit No. 6."

Whereupon the agreement and declaration of trust between the Huntington National Bank of Columbus as trustee and the holders of land trust certificates of equitable ownership in the Lazarus store building site, located in Columbus, Ohio, duly identified, was offered in evidence and marked "Petitioner's Exhibit No. 7." (Copy attached hereto and made a part hereof.)

The deponent further testified: The provision in the lease that was executed requiring payments to be made into the so-called depreciation fund only until it amounts to $2,600,000.00 was a provision insisted upon by the attorneys for the Huntington National Bank in order to be sure that the agreement would come under the Attorney General's ruling as to what constituted a nontaxable security in Ohio under the law. The final agreement was a compromise between the Huntington National Bank and ourselves in that the mandatory half per cent a year stopped when the amount reached $2,600,000.00 in the so-called sinking or depreciation fund but that there was still a permissive basis for us to continue our payments so that if continued as we anticipate this amount would be self-liquidating in a maximum of 48½ years. The calculation made by Mr. Sweney of 48½ years takes into account the taking up of land trust certificates at their called price. We have already acquired land trust certificates in the market so that there has been no premium necessary in the retirement to date and we have on hand now certificates which will pay requirements for the next 16 years that stand us less than par. In order to retire the certificates at

48 par it will take slightly less than 45 years by making the same payments into the sinking fund as required by the lease.

When this transaction was closed there was received from the Huntington National Bank, $3,159,687.50, and of these proceeds

$1,700,000.00 principal plus certain interest was used to pay off the Northwestern Life Insurance Company and the balance used toward the repayment of a million and a half dollars of floating loan that we had negotiated through A. G. Becker and Company, this being the loan referred to in connection with the Shillito stock purchase. In June 1928, I think the land and buildings of The F. and R. Lazarus and Company, in Columbus, were worth in excess of $6,000,000.00. I would not have sold those properties to the bank or anyone else at that time for approximately three and a quarter million dollars. The land and buildings I am talking about are the same as were conveyed to the Huntington National Bank. I am on the executive committee of National Retail Dry Goods Association and in connection with my various official positions and work in the retail department store business, have familiarized myself with the useful life of buildings used in department store business I think. All buildings of The F. and R. Lazarus and Company have been built and all contracts for buildings awarded under my personal supervision. During this same period major repairs and improvements to the John Shillito Company involving an expenditure for buildings and fixtures in excess of three-fourths of a million dollars have been under my personal direction. I am familiar with the type of construction of buildings used in the department store business and with the improvements being made in the type of construction from time to time. In my opinion the probable life of the buildings on The F. and R. Lazarus and Company property in Columbus as department store buildings from the date of their construction I would say to be from 40 to 50 years. We are paying the Huntington National Bank as rental under the indenture of lease 5% on $3,250,000.00 or $162,500.00 a year. In addition we are paying $16,250.00 to the so-called depreciation fund and $3,250.00 as trustee fees. Assuming the Huntington National Bank was the owner of that property the rental we are paying to it under this lease is not a fair rental for the property. It is too little under the lease: at the present time our charges to our business as an operating expense in 1930 were $375,000.00 a year. The difference over what we are paying as interest to Huntington and what we are charging to our departments goes back as a general earning of the business. $250,000.00 of land trust certificates was continued in escrow, for the taking up of certain fees on property on which we had purely a lease contract and on which we could not take up the fee at the time this was negotiated. Since that time we have taken up a few, some small parts of these fees that were available, but have not called upon the Huntington to furnish any of the money. The gross sales of The F. and R. Lazarus and Company in 1928 were approximately $12,000,000.00, at the Columbus store only. There was no change in the method of conducting business between the time just before the land trust certificates were issued and the deed given the Huntington National Bank and the lease taken back and

immediately afterward. Business was conducted in the same place and in the same manner.

CROSS EXAMINATION

In testifying relative to amounts of $162,500.00 a year paid the bank under the terms of the lease $16,250.00 to the depreciation fund and $3,250.00 trustee fees I am adding nothing to the printed record here which appears from the terms of the leasehold agreement.

Whereupon by agreement of counsel there were offered in evidence on behalf of respondent petitioner on review the following documents described and marked as hereinafter stated:

A copy of the record of stockholders' meeting of petitioner company held June 27, 1928, which was marked "Respondent's Exhibit A." (Copy of which is attached hereto and made a part hereof.)

Copy of the record of directors' meeting of petitioner corporation held June 27, 1928, which was marked "Respondent's Exhibit B." (Copy of which is attached hereto and made a part hereof.)

Copy of the minutes of a special meeting of the directors of petitioner corporation held June 28, 1928, which was marked "Respondent's Exhibit C." (Copy of which is attached hereto and made a part hereof.)

50 B. G. HUNTINGTON was called as a witness by and on behalf of the taxpayer and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I live in Columbus and have lived there about 56 years. I am president of the Huntington National Bank and have been so over two years. I was for some years vice president and have been engaged in active business with the Huntington National Bank since 1902. We have acted as bankers for The F. and R. Lazarus and Company for about 15 years. I recall a conversation with Fred Lazarus, Jr., concerning some long-term financing for The F. and R. Lazarus and Company in May 1928. Mr. Lazarus wanted to raise a rather considerable amount of money for his business and was discussing a loan to be made, I believe, in Chicago; he discussed with us the desirability of such loan and we discussed with them the possibility of obtaining the money locally through a land certificate issue rather than through a bond issue. I recommended to Mr. Lazarus that the loan be negotiated in the form of a land-trust certificate issue; it was almost the only possible plan because of the local taxation at that time on mortgage bonds. I proceeded with negotiations with Mr. Lazarus only in a general way; the details of the negotiations were carried on by Mr. Sweney, at that time of our bank; I would say that he was manager of the bond department at that time; after being manager of the bond department he be-

came general manager of the securities corporation, since discontinued. To my knowledge the Huntington National Bank never claimed depreciation on the Lazarus properties.

There was no cross-examination.

LOWRY SWENEY was called as a witness by and on behalf of the taxpayer and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I reside in Columbus and have lived there since August of 1920;

I am a dealer in investment securities and have been in that
51 business since 1919. At the present time I am operating on my own account. I was manager of the bond department of the Huntington National Bank from February of 1921 to November of 1929, after which I became the vice president and general manager of the investment affiliate of the bank. I recall conferring with Fred Lazarus, Jr., on or about May 1928 in regard to some long-term financing which he desired to arrange. The matter was originally negotiated by some conversation that Mr. Lazarus had with some other officer of the Bank and I was instructed to go to Mr. Lazarus and proceed with the negotiations for the financing which I then did. I had a number of conferences with Mr. Lazarus, who stated that he wished to do some financing not only for the purpose of refinancing his insurance loan which he had on part of his property, but to facilitate or enable him to acquire the Shillito Company of Cincinnati; we discussed the amount of money involved in the insurance loan, and so forth, and the nature that the financing should take. I told him that under existing laws, in my judgment, the only way it could be financed in Ohio was in the form of land-trust certificates. This was desirable since it did not saddle the company with comparatively heavy amortization and retirement features as a mortgage loan would have done; it took care of itself in one operation, largely. We would not have taken it in any other manner; mortgage bonds were not salable in Ohio at that time, and it was manifestly impossible, unwise, and probably, in fact, illegal for our bank to have taken such a loan running so many years by itself; it would be unmarketable and the marketability of the thing was of vital importance to us. Mortgage bonds were not marketable. The upshot of the negotiations were that we decided upon land-trust certificates, for the reasons just given. I made a proposal in writing to The F. and R. Lazarus and Company on behalf of the Bank, my recollection being that I wrote one letter which was not exactly satisfactory to Mr. Lazarus, who returned it, and we then wrote another letter. A letter shown me dated June 7, 1928, addressed to The F. and R. Lazarus and Company bears my signature and is the original letter of proposal to which I have testified; I think that was the second letter of proposal; Mr. Lazarus did not accept the

first one to my recollection. A letter shown me dated June 5, 1928, addressed to The F. and R. Lazarus and Company bears my signature, and is the original proposal which was subse-
52 quently changed by the latter dated June 7, 1928, which I have previously identified. I arranged for an appraisal by a local appraisal committee; that appraisal was made immediately prior to the closing of the negotiations. We had to satisfy ourselves as to the value of the property; that there was a sufficient equity there to justify the loan. It was the requirement of our Bank that we would not finance any such property if the amount of the finance was more than 60 percent of the total value of the property. We had another requirement that in no event would we take a land-trust issue where the amount of the certificate was more than the value of the land alone, but this was a secondary consideration with us. The land-trust certificates were sold to the public generally, principally for investment. I prepared a circular in connection with the flotation of these land-trust certificates in printed form issued generally to the public. A printed circular with the caption "Land Trust Certificate" representing 3,500 shares of equitable ownership in The F. and R. Lazarus and Company shown me, is the circular related to the issue handled for petitioner.

Whereupon the document relative to which the witness had testified was offered and received in evidence and marked "Petitioner's Exhibit No. 8." (Copy attached hereto and made a part hereof.)

The witness further testified: In closing the land trust certificate transaction I did not consider the Huntington National Bank was purchasing the properties from petitioner: I considered we were doing a financing job for The F. and R. Lazarus Company financing. I discussed with Mr. Lazarus, before the deal was closed, the question of payment into what was termed the depreciation fund, telling him there should be a depreciation fund or sinking fund: that the standard scale used was one-half of one percent as a maximum amount of certificates outstanding at any time, and that we would require that to be set up and paid to the trustee for the purpose of acquiring certificates. He agreed, though, expressing a preference that the certificate would eventually, as former land trust certificates had been, all be retired, and, on the advice of our counsel, we had the depreciation fund stopped at 80 percent of the amount of certificates issued. I advised Mr. Lazarus as to the approximate
53 time when the accumulations would be sufficient to extinguish the loan, and made a pencil computation reporting my findings to Mr. Lazarus. A pencil memorandum entitled "Land Trust Refirement Figures" shown me is the original memorandum which I prepared and submitted to Mr. Lazarus as to the approximate time of liquidation. On refreshing my recollection by reference to that memorandum I testify that I reported to Mr. Lazarus that it would take forty-eight and a half years to retire the issue using the call prices in each case. The memorandum to which I have just testified

was made and the contents conveyed to Mr. Lazarus prior to the time when the negotiations were completed, forming a part of the general discussion leading to the final consummation of the plan. It was admitted by Counsel for the Commissioner that Petitioner's Exhibit No. 3, attached to the deposition of Mr. Lazarus, is a typewritten copy of the pencil memorandum to which the witness has just been testifying:

CROSS EXAMINATION

I remember that Mr. Converse was one of the appraisers of the Lazarus property; I know him, know that his profession is real estate, and think highly of his ability in that regard. If he said the useful life of the building was 60 years, I would be inclined to think he was right—I wouldn't like to disagree with him.

D. W. Beggs, was called as a witness by and on behalf of the taxpayer, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I have lived in Columbus all my life, about 47 years. My present occupation is real estate and has been for 21 years, including buying and selling and appraisal of real estate properties; practically all the time I have dealt to a large extent in downtown Columbus property.

Whereupon:

It was admitted by counsel for petitioner on review that the witness will testify in the same manner as Mr. Converse with respect to the appraised value of $6,509,552.00 as of June 13, 1928.

54 The witness further testified:

I have served a good many years on the Appraisal Committee of the Columbus Real Estate Board; have been chairman of the appraisal board for quite a few years and chairman of the Ohio Association Appraisal Board; president of the Columbus Real Estate Board in 1926. In determining the life of buildings for depreciation purposes it is all according to the type of building; some buildings will depreciate faster than others. In my various engagements I have been called upon to make such determinations. I am familiar with the buildings occupied by The F. and R. Lazarus and Company in June 1928 and in my opinion, based upon my experience, the useful life of that building occupied by the Lazarus Company from June 1928 would be 40 to 50 years; my testimony is as to the estimated life from date of construction of the buildings.

CROSS EXAMINATION

I know Mr. C. L. Converse, and that his deposition was taken last week relative to this case, but did not hear him testify. I think Mr. Converse's ability is very good, but I don't always agree with him.

I disagree with him as to his opinion that the building erected by Lazarus was good for 60 years, for a great many reasons. He refers to Columbus as a small city. There are 2,000,000 people within 75 miles contributing to the support of stores in Columbus. Columbus is a large city when you consider the area from which it draws; buildings will depreciate here from a standpoint of obsolescence about as quickly as they will in a city like Cleveland, Chicago, or some of the other larger cities in my opinion.

FRED VERCOE, was called as witness by and on behalf of the taxpayer and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I live in Columbus, Ohio, and have lived there about 58 years. I am in the brokerage business and have been a member of the Board of Directors of the Mortgage Loan Committee of the Midland Mutual Life Insurance Company which buys a great many
55 mortgages for very close to 20 years. I am also a director in the Guaranty Title & Trust Company which deals in mortgages and which has brought me in contact with a great many appraisals of real estate. I was a member of the committee of three who appraised the property of The F. and R. Lazarus and Company in June 1928. My experience in determining remaining useful life of buildings properties has not been so much in the downtown real estate as in other kinds. I have been interested in some downtown real estate pieces myself. I am familiar with building property in downtown Columbus. In reaching a conclusion as to the value of the Lazarus properties in June 1928 I gave consideration to the remaining useful life of those properties and in my opinion the remaining useful life of the Lazarus properties after date of their construction was from 45 to 50 years.

It was stipulated between counsel for the petitioner and counsel for the respondent that Mr. Vercoe would testify in the same manner as Mr. Converse with respect to the total value of $6,509,552 for the Lazarus properties as of June 1928.

There was no cross-examination.

CLARENCE PALMER, was called as a witness by and on behalf of the taxpayer and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I live in Columbus and have resided there for about 24 years. My present business connection is with Robert H. Evans and Company, General Contractors, and have been in the contracting business 25 years. We built the building, the new building for The F. and R. Lazarus and Company, built the Beggs building and the Buckeye State Building & Loan Building which are some of the larger build-

ings in downtown Columbus. We built the Vorys, Sater, Seymour & Pease Building, and the Central High School building across the river and a large amount of construction for the Pennsylvania Railroad. In erecting the new Lazarus building we had to put a bridge across the alley and carry the full height of the new building
56 to the old building and in building this bridge we had to reinforce the steel in the old building and also undermine the footings and place new footings under the steel; the steel was not sufficient to carry the load. We also had to practically remodel the first floor and the fifth floor to make it conform to the requirements of the new building and the other floors were remodelled also. I have formed an opinion as to the useful life of the Lazarus buildings. The present building is constructed in a peculiar way and has a concealed sprinkler system. The sprinkler system was concealed in what is known as a split tile. The tile was split and then put together, wired up and plastered over and it is my opinion and has always been my opinion that that will eventually corrode and is going to be a very serious expense. In reaching my conclusion as to the remaining useful life of the Lazarus building, I have given effect to my general experience in connection with construction and reconstruction of other buildings in Columbus, and in my opinion the remaining useful life of the Lazarus buildings after date of construction is approximately 40 years.

CROSS EXAMINATION

I would not say 50 years.

J. W. STEINHAUSER, was called as a witness by and on behalf of the taxpayer and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

I live in Columbus, Ohio, and have resided there 50 years. I am assistant treasurer of the F. and R. Lazarus and Company and have been for 23 years. I have charge of the records and accounting of the corporation, and under the supervision of Fred Lazarus, Jr., the treasurer, I take care of the financing. The F. and R. Lazarus and Company was founded in 1851. In June 1928, the F. and R. Lazarus and Company received from the Huntington National Bank in connection with the land trust certificate issue $3,159,687.50. With that money an existing mortgage loan in favor of the Northwestern Mutual Life Insurance Company of Milwaukee was paid off in
57 the principal sum of $1,700,000; interest to date, $42,500 and penalty for prepayment $25,000, making an aggregate paid to the Northwestern of $1,767,500. There was paid to A. G. Becker and Company, Chicago, Illinois, in payment of notes $1,500,000, and to the same in payment of interest to date, $43,750, making an aggregate disbursement of $3,311,250, the difference of $151,562.50 having been

withdrawn from current fund in banks. The mortgage in favor of the Northwestern Mutual Life Insurance Company was retired in advance of its due date. That mortgage was a ten year mortgage and was paid in two years. In closing the land trust certificate deal with the Huntington National Bank, the mortgage to the Northwestern Mutual Life Insurance Company was cancelled. Then a deed was given from The F. and R. Lazarus and Company to the Huntington National Bank as trustee and then a 99-year lease from the Huntington National Bank, trustee, was given back to the F. and R. Lazarus and Company. Then all those papers were filed, and beyond that, the lease and the indenture of lease and the trust agreement were filed. The various instruments to which I have just referred were all signed at the same date and at the same meeting except the mortgage to the Northwestern, which was in existence and that had been signed prior. After the signing of the various instruments, I personally took them to the courthouse and filed them in rotation and that caused a lapse of two minutes and one minute. The books of the petitioner show a cost in June 1928 of the Lazarus building of $2,467,952.57, which includes the original building started in June 1908, occupied in August 1909, and paid in full in October 1910, in the amount of $297,003.95, and an addition started in May 1921, occupied in part in that year and paid in full in May 1922, at a cost of $258,054.71; a new building started in September 1925, occupied in part through 1926 and 1927 and paid in full in January 1928, costing $1,912,893.91, the aggregate cost of these items being $2,467,952.57 as I have previously testified. Each of the buildings to which I have testified as to their cost were regularly used during the taxable year in the conduct of the petitioner's business without any interruption at or after the time of refinancing in 1928. There has been no demolition of the buildings between June 1928 and the present time. The buildings about which I
58 have testified were not entirely erected upon ground owned in fee by the petitioner. The addition referred to as having been built, started in 1921, was built on a 99-year lease. The lease was acquired in 1915 and this building was constructed in 1921 and the exception to which I just testified is one of the leases in the indenture of lease. There is another 99-year lease, but the building, the store building does not cover that ground. The petitioner, in its tax return for the year 1928 claimed a rate of depreciation of two and a half per cent. In the petitions filed with the Board for the fiscal years ended January 31, 1930 and 1931, the rate of depreciation used in determining the amount of depreciation was two and one half per cent per annum. That two and a half per cent was applied to the cost to which I have testified of $2,457,952.57 and the total amount of depreciation claimed on that basis was $61,698.14.

CROSS EXAMINATION

I know how the cost of these properties of $2,400,000 odd was paid. It was paid by checks and was a cash transaction paid by checks drawn on the Bank.

* * * * * * *

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals relating to the petition for review and assignments of error of the petitioner on review, Guy T. Helvering, Commissioner of Internal Revenue, and the same is approved by the undersigned, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) MORRISON SHAFROTH.
Chief Counsel,
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals relating to the petition for review and assignments of error of the petitioner on review, Guy T. Helvering, Commissioner of Internal Revenue, and the same is approved by the undersigned as attorneys for the re-
59 spondent on review, The F. and R. Lazarus and Company.

(Signed) ROBERT P. GOLDMAN,
(Signed) HARRY STICKNEY,
Attorneys for Respondent on Review.

Order settling statement of evidence

The foregoing is all of the material evidence adduced at the hearing relating to the petition for review and assignments of error of the petitioner on review, Guy T. Helvering, Commissioner of Internal Revenue, and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 26th day of March 1937.

(Signed) EUGENE BLACK,
Member, United States Board of Tax Appeals.

60 *Petitioner's exhibit No. 1*

COLUMBUS, OHIO, *June 13, 1928.*

The HUNTINGTON NATIONAL BANK,
Columbus, Ohio.

GENTLEMEN: We have this day appraised the land described as follows at the amounts set forth below:

Parcel No. 1—Size, 187½ feet square, bounded by S. High St., W. Town St., S. Wall St., and W. Chapel St	$3,000,000.00
Parcel No. 2—Size 187½ feet square, bounded by S. Front St., W. Town St., S. Wall St., and W. Chapel St	703,125.00
Total land value in fee	$3,703,125.00
Less fee simple titles to approximately 45 feet under 99-year lease with privilege to purchase at	250,000.00
	$3,453,125.00
Total value of building	$3,056,427.00
Total value	$6,509,552.00

Respectfully submitted.

R. L. CONVERSE.
FRED VERCOE.
D. WENDALL BEGGS.

61 *Petitioner's Exhibit No. 2*

[Copy of]

Minutes of Special Meeting of The Board of Directors of The F. and R. Lazarus & Company

Called for Monday, May 28th, 1928.

The following were present—Simon Lazarus, Robert Lazarus, Jeffrey Lazarus, and Fred Lazarus, Jr.

The general finances of The F. & R. Lazarus & Company were discussed by the Secretary-Treasurer and it was recommended that an effort be made to cancel the present outstanding mortgage with the Northwestern Mutual Life Insurance Company, and to negotiate another and larger first mortgage for a period of not less than twenty-five years, or a so-called "Fee Certificate" issue; either plan to provide an amount in excess of Three Million Dollars in order to cover the refunding of the Northwestern Mutual Life Insurance Company mortgage, and to provide most of the funds necessary for the acquisition of the Shillito interests and the surrounding property.

Upon motion of Robert Lazarus, seconded by Jeffrey Lazarus, it was unanimously voted that the Secretary be instructed to proceed with negotiations and when negotiations were completed to report back to the Board.

There being no further business, the meeting adjourned.

(Signed by) SIMON LAZARUS,
President.

(Signed by) FRED LAZARUS, JR.,
Secretary.

62 *Petitioner's Exhibit No. 3*

[Copy]

LAND TRUST RETIREMENT FIGURES

$4,062.50	compounded quarterly at 1¼% for 10 years, (40 Periods)	$211,791.03
	divided by 103, equals $205,000 plus $641.03	
	Retired 1st 10 years.	
$4,062.50	compounded quarterly at 1¼% for 20 years, (80 Periods)	559,894.89
	minus $211,791.03 equals $348,103.86	
	Divided by 102, equals $341,000	
	Plus $278.00	
	Retired 2nd 10 years.	
$3,250,000	Minus $546,000 equals $2,704,000	
	Times 101 equals	$2,731,040
	At end of 20th year, per quarter:	
	Depreciation Fund	$4,062.50
	Rental on $546,000 with Trustee	6,825.00
	Total Payments per quarter	$10,887.50

$10,887.50 compounded at 1¼% will retire $2,731,040 in 114 periods, or 28½ years, plus 20 (above) equals 48½ years to retire issue.

Note: Retired 1st 10 years	$205,000.00
2nd 10 years	341,000.00
Next 28½ years	2,731,040.00
48½	$3,277,040.00
Issued	$3,250,000.00

The performance will be better than this schedule as so far no premium has been paid on Certificates purchased for retirement.

63 *Petitioner's exhibit No. 4*

[Copy]

Organized 1866.

THE HUNTINGTON NATIONAL BANK OF COLUMBUS,
June 5, 1928.

LOWRY SWENEY,
Mgr. Bond Department.

THE F. AND R. LAZARUS & COMPANY,
Columbus, Ohio.

Att: Mr. Fred Lazarus, Jr.

GENTLEMEN: We understand that you are vested with or can acquire the fee simple title to the property known as the Lazarus Store on South High Street and running through to Front Street, Columbus, Ohio, with the exception of two small pieces which are held by virtue of 99-year leases and which it is impossible or impracticable to take up in fee at the present time.

We further understand that upon payment to you of $3,144,375 with adjustment of rental, if any, to date of payment you will con-

vey to us by deed of general warranty, properly executed, free and clear of all encumbrances, the fee simple title to that part of the property owned in fee and by instrument of general assignment the title to the 99-year leases on the two above-mentioned parcels; we will then, as Trustee, or otherwise at our option, make or enter into a 99-year lease, renewable forever, dated as of June 1, 1928, or otherwise if desirable, naming you as lessee; said lease shall, among other terms, agreements, provisions, and conditions, provide for:

(a) Annual rentals payable in equal quarterly installments in advance of $162,500 plus the rental payable under the two existing 99-year leases above referred to.

(b) An additional rental of $16,250 to be used as provided in the lease as a fund against the depreciation of the property.

Note: This may be suspended during the life of the lease
64 after a certain period which shall be set by our attorneys and which shall be satisfactory to you. Subject to the approval of our counsel you may, as you desire, make additional payments into this depreciation fund to be used in the same manner as the minimum payments under the terms of the lease.

(c) An additional rental of $3,250 to be used as provided in the lease (in pencil by Mr. Fred Lazarus, Jr., "the same to be in full payment of all fees and charges of the Trustee under all and any instruments relating thereto").

(d) As lessee under this lease you shall pay all taxes, assessments, debts and charges of whatever character levied, assessed, or charged in connection with said premises and said lease, except any income, inheritance and Federal Estate taxes.

(e) Insurance on the buildings and equipment for 90% of the full insurable value shall be maintained at the cost of the lessee, with policies deposited with the lessor or a Trustee for insurance and with proceeds in the event of loss payable to the depository, to be used in the manner as provided in the lease.

(f) You, as lessee, will have the option to purchase the fee simple title and the 99-year leases on the premises as follows:

During the second 5 years of the lease at 103% of $3,250,000.

During the next 10 years of the lease at 102% of $3,250,000.

Thereafter at 101% of $3,250,000.

It is understood that the form of 99-year lease will be satisfactory to us but that it will be in the general form heretofore executed by us in instances where land or lease trust certificates have been issued and will, of course, be subject to the approval of your counsel and yourselves.

Building restrictions in this lease will be of a general form heretofore used by our attorneys in similar cases and will provide, among other things, that during the term of the lease no building upon the premises shall be torn down or removed or any structural alterations made which will diminish the value thereof, unless prior to such demolition, alteration, or removal, satisfactory

65 bond or securities shall be lodged with the Trustee to guarantee the completion, free and clear of all mechanics and other liens, of a new building of at least the same value as that torn down. This bond shall be of a security acceptable to the Trustee, shall be in the penal sum of the value of the building or buildings to be destroyed, which valuation shall be satisfactory to the Trustee, and in the event of forfeiture shall have its proceeds available to the Trustee for either the completion of the new building or at the Trustee's option addition to the depreciation fund under the terms of this lease as above mentioned.

When, during the life of this lease it shall become possible to purchase either one or both of the fees to the two parcels now held on 99-year leases, the Trustee may issue land and/or lease trust certificates in an amount equal to the capitalization of the ground rent of the parcel being purchased on a 5% basis to anyone who will pay therefor such a basis. Such certificates will be in addition to any that may now be issued by the Trustee; will share equally with all outstanding certificates and will be issued to the amount of one fraction for each $50 of ground rent formerly paid for the fee being acquired. Upon the acquisition of the fee to one or both of the leased parcels, ground rent on the underlying leases shall cease, and rents paid under the new lease shall be increased in the proportion that the number of additional fractional interest bears to 3250. The figure at which you may purchase the property shall also be increased by enough to buy the additional fractions at the same premium as before stated.

You will furnish us with an earning statement of the F. and R. Lazarus & Company for the last three years, which earnings shall show, after all prior charges, at least twice the rental requirements under this lease. You will also furnish us with such figures as we may require, such as balance (in pencil by Mr. Fred Lazarus, Jr. "earnings"), operating statements, etc., for the last five years with the understanding that these figures will not be given publicity by us. (Deleted by Mr. Fred Lazarus, Jr. "by us.").

If these figures are not those of an independent firm of certified public accountants satisfactory to us you will allow our accountants access to your books for examination and check.

66 All expenses in connection with this matter such as appraisals, legal fees, printing, audits, etc., will be borne by you, it being understood, however, that the limit that you will pay is $10,000. We will secure for you at the time of the appraisal of the property a statement by the same appraisers as to the value of your property as of March 1, 1913. (In pencil by Mr. Fred Lazarus, Jr. "At no additional cost.")

This contract is subject to all of the foregoing terms and conditions as well as approval by our counsel, of all legal details in connection with this transaction, to our securing a satisfactory appraisal on the property and is good until the close of business Thursday,

June 7, 1928. It is also subject to your being able to secure a complete release from the Northwestern Mutual Life Insurance Company of the present mortgage on the property.

If this is acceptable to you please note your acceptance in the place indicated below and thereupon this shall become a binding contract between us.

THE HUNTINGTON NATIONAL BANK, OF COLUMBUS.

By (Signed) LOWRY SWENEY.

We hereby accept the above proposition subject to the terms and conditions as outlined.

67 *Petitioner's Exhibit No. 5*

[Copy]

Organized 1866

THE HUNTINGTON NATIONAL BANK OF COLUMBUS,

June 7, 1928.

LOWRY SWENEY,
Mgr. Bond Department,
THE F. AND R. LAZARUS & COMPANY,
Columbus, Ohio.

Att: Mr. Fred Lazarus, Jr.

GENTLEMEN: We understand that you are vested with or can acquire the fee simple title to the property known as the Lazarus Store on South High Street and running through to Front Street, Columbus, Ohio, with the exception of two small pieces which are held by virtue of 99-year leases and which it is impossible or impracticable to take up in fee at the present time.

We further understand that upon payment to you of $3,144,375 with adjustment of rental, if any, to date of payment you will convey to us by deed of general warranty, properly executed, free and clear of all encumbrances, the fee simple title to that part of the property owned in fee and by instrument of general assignment the title to the 99-year leases on the two above-mentioned parcels; we will then, as Trustee, or otherwise at our option, make or enter into a 99-year lease, renewable forever, dated as of June 1, 1928, or otherwise if desirable, naming you as lessee; said lease shall, among other terms, agreements, provisions, and conditions provide for:

(a) Annual rentals payable in equal quarterly installments in advance of $162,500 plus the rental payable under the two existing 99-year leases above referred to.

(b) An additional rental of $16,250 to be used as provided in the lease as a fund against the depreciation of the property.

Note: This may be suspended during the life of the lease after a certain period which shall be set by our attorneys and which
68 shall be satisfactory to you. Subject to the approval of our

counsel you may, as you desire, make additional payments into this depreciation fund to be used in the same manner as the minimum payments under the terms of the lease.

(c) An additional rental of $3,250 to be used as provided in the lease, the same to be in full payment of all fees and charges of the Trustee as compensation to it for services rendered under all and any instruments relating hereto. This is subject to (d) hereof and to change as afterwards provided in the event of any additional certificates being issued.

(d) As lessee under this lease you shall pay all taxes, assessments, debts, and charges of whatever character levied, assessed, or charged in connection with said premises and said lease, except any income, inheritance, and Federal Estate taxes.

(e) Insurance on the buildings and equipment for 90% of the full insurable value shall be maintained at the cost of the lessee, with policies deposited with the lessor or a Trustee for insurance and with proceeds in the event of loss payable to the depositary, to be used in the manner as provided in the lease.

(f) You, as lessee, will have the option to purchase the fee simple title and the 99-year leases on the premises as follows:

During the second 5 years of the lease at 103% of $3,250,000.

During the next 10 years of the lease at 102% of $3,250,000.

Thereafter at 101% of $3,250,000.

It is understood that the form of 99-year lease will be satisfactory to us but that it will be in the general form heretofore executed by us in instances where land or lease trust certificates have been issued and will, of course, be subject to the approval of your counsel and yourselves.

Building restrictions in this lease will be of a general form heretofore used by our attorneys in similar cases and will provide, among other things, that during the term of the lease no building
69 upon the premises shall be torn down or removed or any structural alterations made which will diminish the value thereof, unless prior to such demolition, alteration or removal, satisfactory bond or securities shall be lodged with the Trustee to guarantee the completion, free and clear of all mechanics and other liens, of a new building of at least the same value as that torn down. This bond shall be of a security acceptable to the Trustee, shall be in the penal sum of the value of the building or buildings to be destroyed, which valuation shall be satisfactory to the Trustee, and in the event of forfeiture shall have its proceeds available to the Trustee for either the completion of the new building or at the Trustee's option addition to the depreciation fund under the terms of this lease as above mentioned.

When, during the life of this lease it shall become possible to purchase either one or both of the fees to the two parcels now held on 99-year leases, the Trustee may issue land and/or lease trust certificates in an amount equal to the capitalization of the ground rent

of the parcel being purchased on a 5% basis to anyone who will pay therefor such a basis. Such certificates will be in addition to any that may now be issued by the Trustee; will share equally with all outstanding certificates and will be issued to the amount of one fraction for each $50 of ground rent formerly paid for the fee being acquired. Upon the acquisition of the fee to one or both of the leased parcels, ground rent on the underlying leases shall cease, and rents paid under the new lease shall be increased in the proportion that the number of additional fractional interests bears to 325. The figure at which you may purchase the property shall also be increased by enough to buy the additional fractions at the same premium as before stated.

You will furnish us with an earning statement of the F. and R. Lazarus & Company for the last three years, which earnings shall show, after all prior charges, at least twice the rental requirements under this lease. You will also furnish us with such figures as we may require, such as balance sheets, operating statements, etc., for the last five years with the understanding that earnings will not be given publicity, except as ratio to charges.

If these figures are not those of an independent firm of cer-
70 tified public accountants satisfactory to us you will allow our accountants access to your books for examination and check.

All expenses in connection with this matter such as appraisals, legal fees, printing, audits, etc., will be borne by you, it being understood, however, that the limit that you will pay is $10,000. We will secure for you at the time of the appraisal of the property a statement by the same appraisers as to the value of your property as of March 1, 1913, at no additional cost to you.

This contract is subject to all of the foregoing terms and conditions as well as approval by our counsel, of all legal details in connection with this transaction, to our securing a satisfactory appraisal on the property and is good until the close of business Thursday, June 7, 1928. It is also subject to your being able to secure a complete release from the Northwestern Mutual Life Insurance Company of the present mortage on the property.

We understand that you desire to close this matter and receive the money therefrom on June 28, 1928. Subject to complete legal approval by our attorneys we will be ready to close on that date.

If this is acceptable to you please note your acceptance in the place indicated below and thereupon this shall become a binding contract between us.

THE HUNTINGTON NATIONAL BANK OF COLUMBUS.
(Signed by) LOWRY SWENEY.

We hereby accept the above proposition subject to the terms and conditions as outlined.

THE F. & R. LAZARUS & CO.
(Signed by) FRED LAZARUS, JR., *Treas.*

71 *Petitioner's exhibit No. 6*

Indenture of Lease Between The Huntington National Bank of Columbus, Trustee, and The F. & R. Lazarus & Company, Dated June 1, 1928, Lazarus Store Building, Columbus, Ohio

Filed in the office of the Recorder of Franklin County, Ohio, on June 28, 1928, as Document No. 1834.

Indenture of lease (hereinafter sometimes referred to as Lease), made and entered into as of June 1, 1928, but actually signed and delivered June 27th, 1928, by and between The Huntington National Bank of Columbus, a national banking association organized and doing business under the laws of the United States of America, with its principal office in the City of Columbus, Ohio, as Trustee for such persons, partnerships, associations, or corporations as may be or become the owners and holders of Land Trust Certificates which may at any time be issued in accordance with the provisions of an Agreement and Declaration of Trust, dated for convenience June 1, 1928, to be recorded in the Recorder's office of Franklin County, Ohio, following the recording of this Lease in said office, as Lessor (hereinafter sometimes designated and referred to as Lessor), and The F. & R. Lazarus & Company, a corporation, organized and doing business under the laws of the State of Ohio, with its principal office in the City of Columbus, Ohio, as Lessee (hereinafter sometimes designated and referred to as Lessee).

Witnesseth:

ARTICLE ONE

PREMISES AND TERM

SECTION 1. That the Lessor, for and in consideration of the
72 rent and additional amounts to be paid, of the rights reserved, and of the covenants and agreements hereinafter set forth to be kept, performed, and observed by the Lessee, has demised and leased, and by these presents does demise and lease, unto the Lessee, all right, title, and interest of the Lessor in and to the following-described premises, to-wit:

PARCEL I

Situated in the City of Columbus, County of Franklin, and State of Ohio, and being all of Inlot Number Two Hundred Fifty-eight (258) in said City of Columbus, as the same is numbered and delineated upon the recorded plat thereof, of record in Deed Book "F," page 332, Recorder's Office, Franklin County, Ohio; also,

All of Lots Numbers One (1), Two (2), Four (4), Five (5), of a subdivision of Inlots Two Hundred Fifty-nine (259) and Two Hundred Sixty (260) in said City of Columbus, Ohio, made by Lincoln Goodale's Executors, as the same are numbered and delineated on

the recorded plat thereof, of record in Plat Book Number 2, page 52, Recorder's Office, Franklin County, Ohio, excepting from said Lot No. 2 the northerly 45/100 feet in width thereof; also that part of said Lot Number Three (3) of said subdivision bounded and described as follows:

Commencing at the northwest corner of said Lot Number Four (4); thence with the north line of said Lot Number Three (3) westwardly twelve (12) feet; thence at right angles southerly sixteen (16) feet and eleven (11) inches; thence eastwardly twelve (12) feet to the southwest corner of said Lot Number Four (4); thence northwardly to the place of beginning; also

All of lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), and Nine (9), and including all vacated alleys, in the Subdivision of Inlots Numbers Two Hundred Three (203), Two Hundred Four (204), and Two Hundred Five (205) in the City of Columbus, Ohio, made by the Executors of L. Goodale, as the same are numbered and delineated upon the recorded plat of said Subdivision, of record in Plat Book Number 2, page 15, Recorder's Office, Franklin County, Ohio; also,

73 All that part of the buildings situated on the foregoing premises, and that which now extends above and over Wall Street in said City, and joins the building fronting on High Street with the building fronting on Front Street in said City, together with all of the rights in respect thereto as more fully set out in Ordinance No. 36350 passed by the Council of the City of Columbus on May 25, 1925.

PARCEL II

Situated in the City of Columbus in the County of Franklin, and in the State of Ohio, and being Lot Number Three (3) of a Subdivision of Inlots Numbers Two Hundred Fifty-nine (259) and Two Hundred Sixty (260) in the City of Columbus, made by the Executors of Lincoln Goodale, deceased, and of record in Plat Book Number 2, page 52, Recorder's Office, Franklin County, Ohio; excepting, however, the following described part thereof: beginning at the northwest corner of Lot Number Four (4) of said Subdivision; thence with the north line of said Lot Number Three (3), westwardly twelve (12) feet; thence at right angles southerly sixteen (16) feet, eleven (11) inches; thence eastwardly twelve (12) feet to the southwest corner of said Lot Number Four (4); thence northwardly sixteen (16) feet, eleven (11) inches to the place of beginning; also,

A part of Lot Number Two (2) of a Subdivision of Inlots Number Two Hundred Fifty-nine (259) and Two Hundred Sixty (260) in the City of Columbus, made by the executors of Lincoln Goodale, deceased, and of record in Plat Book Number 2, page 52, Recorder's Office, Franklin County, Ohio: "Being a strip of ground for a distance of sixty-two and one-half ($62\frac{1}{2}$) feet running west from High Street and being forty-five one-hundredths ($\frac{45}{100}$) feet wide off of

the north side of Lot Number Two (2) of Goodale's Executors Subdivision of Inlots Numbers Two Hundred Fifty-nine (259) and Two Hundred Sixty (260), bounded and described as follows:

Beginning at a point in the east line of said Lot Number Two (2) Forty-five Hundredths ($^{45}/_{100}$) feet south of the northeast corner thereof (said beginning point being the south line of the brick
74 work of a brick wall standing at this date at this point and being Eighty-eight and Five Hundredths (88.05) feet south from the true south line of Chapel Street, said true south line being One and Eighty-Five Hundredths (1.85) feet south of the north edge of the foundation of the brick building now located at the southwest corner of High and Chapel Streets); thence westerly and parallel to the north line of said lot a distance of Sixty-two and One-half ($62\frac{1}{2}$) feet to point which point is located Fifty-five Hundredths ($^{55}/_{100}$) feet north of the south line of the brick work of a brick wall standing at this date at this point, a witness to said last-mentioned point being an iron pin located Ten (10) feet west of the west line and Three (3) feet south of the south line of said strip of ground); thence northerly and parallel to the east line of said lot Forty-five Hundredths ($^{45}/_{100}$) feet to a point at the northwest corner of said lot; thence easterly along the north line of said lot a distance of Sixty-two and One-half ($62\frac{1}{2}$) feet to the northeast corner of said lot; thence southerly along the east line of said lot Forty-five Hundredths ($^{45}/_{100}$) feet to the place of beginning. The said fixed two points at the ends of the south line of the premises hereby described to be paramount over all things in determining and location of the premises hereby described; being the same premises described in and leased by that certain Indenture of Lease dated December 11, 1915, from Henry Barcus et al. to Fred Lazarus, recorded in Lease Records Volume 27, page 536, in the office of the Recorder of Franklin County, Ohio, which Lease and the leasehold estate created thereby have been assigned and transferred to the Lessor.

PARCEL III

Situated in the County of Franklin, in the State of Ohio and in the City of Columbus, and being Lot Number Six (6) of a Subdivision of Inlots Numbers Two Hundred Fifty-eight (258), Two Hundred Fifty-nine (259) and Two Hundred Sixty (260), in the City of Columbus, as made by the Executors of Lincoln Goodale, deceased, as the same is numbered, and delineated upon the recorded plat thereof,
of record in Plat Book Number 2, page 52, Recorder's Office,
75 Franklin County, Ohio; being the same premises described in and leased by that certain Indenture of Lease dated June 8, 1915, from Katharine E. Hutchinson et al. to The Whitsit Realty Company, recorded in Lease Records Volume 27, Page 119, in the office of the Recorder of Franklin County, Ohio, which Lease and the leasehold estate created thereby have been assigned and transferred to the Lessor.

To have and to hold the demised premises together with all the rights, privileges, franchises, easements and appurtenances thereunto belonging or appertaining for and during the term of ninety-nine (99) years, commencing as of June 1, 1928, and ending at midnight May 31, 2027, and renewable for further terms of
76 ninety-nine (99) years each, upon the terms and subject to the conditions as expressed in Article Twenty-eight of this Lease, unless the term of this Lease is, before the expiration thereof, terminated as hereinafter provided; provided, however, That this Lease is made upon the express condition that in case the Lessee shall fail to pay any rent and/or any additional amounts, or perform or observe any covenant or condition in this Lease contained, and the Lessor shall serve the notice specified in Article Eighteen hereof, then, at the option of the Lessor, the term hereby granted shall terminate with the same force and effect as if the entire ninety-nine years hereof shall have elapsed, and there shall have been no renewal.

Article Two

RENTAL AND OTHER PAYMENTS

Section 1. The Lessee, in consideration of the leasing of the premises aforesaid and of the other rights hereby granted, does hereby covenant and agree to and with the Lessor to pay to the Lessor as rent for said demised premises, at the principal office of the Lessor in the City of Columbus, Ohio, or at such bank or trust company or office, or to such person in Columbus, Ohio, as said Lessor shall from time to time designate in writing to receive such rent, and if the Lessor shall not have an office in the City of Columbus, Ohio, and in default of such designation, then at the demised premises, without any deduction or diminution whatever, a yearly rental equal to the aggregate of the following:

(a) One Hundred and Seventy-five Thousand Dollars ($175,000);

(b) Until the entire lessor interest and estate in the real estate described in Parcel 2 above shall have been acquired by the exercise of the option to purchase granted in the lease described in said Parcel 2, all amounts required to be paid by the lessee under said lease, including rentals as follows: Until April 1, 1936, the sum of Seven Thousand Dollars ($7,000.00) per annum and after April 1 1936, the sum of Seven Thousand Five Hundred Dollars ($7,500.00) per annum;

(c) Until the entire lessor interest and estate in the real estate described in Parcel 3 above shall have been acquired by the
77 exercise of the option to purchase granted in the lease described in said Parcel 3, all amounts required to be paid under said lease, including rentals as follows: Until November 15, 1928, at the rate of Four Thousand Seven Hundred Fifty Dollars ($4,750.00) per annum, the next quarterly installment of which in the

amount of One Thousand One Hundred Eighty-Seven and 50/100 Dollars ($1,187.50) being due August 15, 1928; and after November 15, 1928, the sum of Five Thousand Dollars ($5,000.00) per annum.

Said rentals under (a) above shall be paid during each of the years of the term of this Lease and all renewals thereof and shall be paid in equal quarterly installments, in advance, on the first business days of March, June, September, and December in each year, the first quarterly installment being payable as of June 1, 1928.

Said rentals payable under (b) above shall be paid in equal quarterly installments on the 25th days of March, June, September, and December in each year.

Said rentals payable under (c) above shall be paid in equal quarterly installments on the 10th days of February, May, August, and November in each year.

SECTION 2. As a further consideration for the leasing of said premises, and the rights granted by this Lease, the Lessee further agrees to pay to the Lessor, at the place provided in Section 1 of this Article, additional rental as follows: Until the acquisition by the Lessor of the lessor interests or estates in the real estate described in either or both Parcel 2 and Parcel 3 above, the sum of Three Thousand, Two Hundred Fifty Dollars ($3,250.00) annually; upon and after the acquisition of the lessor interest and estate in the real estate described in Parcel 2 above, the additional sum of One Hundred Fifty Dollars ($150.00) annually; upon and after the acquisition of the lessor interest and estate in the real estate described in Parcel 3 above, the further additional sum of One Hundred Dollars ($100.00) annually; said rentals to be paid during each of the years of said term or any renewals thereof in equal quarterly installments on the first business days of March, June, September, and December in each year, the first of said installments being payable on the first business day of September, 1928.

SECTION 3. Each and all of the amounts payable under Sec-
78 tions 1 and 2 of this Article, as well as any other amounts payable by the Lessee to the Lessor under the terms of this Lease, shall be paid in gold coin of the United States of America of or equal to the standard of weight and fineness existing June 1, 1928; provided, however, that the Lessor may, at its option, accept payment other than in gold coin aforesaid, but subject to the provisions of Section 5 of Article Twenty-five of this Lease.

SECTION 4. Payments provided to be made in this Article not paid when due shall bear interest at the rate of Eight Per Cent. (8%) per annum from date when due to date of payment computed quarterly.

ARTICLE THREE

DEPRECIATION FUND

SECTION 1. It is agreed that there will be a substantial depreciation in value of the demised premises and improvements located

thereon during the occupancy of the Lessee under this Lease, and that the amount and extent thereof is and will be uncertain and incapable now or hereafter of exact determination; also that the amount of damage to the Lessor in the event of default by the Lessee hereunder and the resultant termination of this Lease by the Lessor is and will be likewise uncertain. In view of such uncertainty and in order to avoid the necessity of attempting in the future to approximate the amount of such depreciation and/or damage, and to indemnify the Lessor against any and all liability, the Lessee agrees to create and maintain in the hands of the Lessor a Depreciation Fund under the following terms and conditions and for the uses, benefits, and purposes hereinafter set forth, to-wit:

The Lessee will create a Depreciation Fund in the sum of Two Million, Six Hundred Thousand Dollars ($2,600,000.00) and will pay into such Fund beginning September 1, 1928, in equal quarterly installments, payable on the first business day of each March, June, September, and December in each year, the sum of Sixteen Thousand, Two Hundred Fifty Dollars ($16,250.00) annually; upon and after the acquisition by the Lessor of the lessor interest and estate in the real estate described in Parcel 2 above, the annual depreciation payment shall be increased by the sum of Seven Hundred Fifty Dollars ($750.00) per annum, payable in equal quarterly installments as above provided, and upon the acquisition by the Lessor of the
79 lessor interest and estate in the real estate described in Parcel 3 above, the annual depreciation payment shall be further increased by the sum of Five Hundred Dollars ($500.00) per annum, payable in equal quarterly installments as above provided.

All such depreciation payments shall be kept in a separate fund by the Lessor and shall be known as the "Lazarus Store Depreciation Fund." The Lessor will mail to the Lessee a semiannual report as to the condition of the Fund on April 1 and October 1 of each year. The interest on funds so paid into the Depreciation Fund, and/or the income from the securities into which such funds are invested, shall be added to the Depreciation Fund, and the Lessee will continue to make such payments into the Depreciation Fund until the Depreciation Fund shall equal the sum of Two Million, Six Hundred Thousand Dollars ($2,600,000.00), after which time and so long as the principal amount in said fund shall equal said sum of Two Million, Six Hundred Thousand Dollars ($2,600,000.00) and the Lessee is not in default under this Lease, the Lessee shall be entitled to receive from the Lessor, currently as received, the interest and/or income from the Depreciation Fund, less any taxes, income or otherwise, which the Lessor may be required to pay or withhold on account thereof. Any assignment of this Lease shall of itself operate to transfer to the assignee all the right, title, and interest of the Lessee (or other assignor) in and to the Depreciation Fund.

SECTION 2. The Lessor agrees to pay interest on said sums at such rate and under such rules as from time to time relate to the payment

of interest on similar funds deposited with the Lessor, which interest, when so paid or credited to said fund, shall be and remain an addition thereto as hereinabove set forth, provided that the Lessor may from time to time invest and reinvest any amounts remaining in said fund in obligations of the United States of America, or in Land Trust Certificates issued under said Agreement and Declaration of Trust, subject to the request of the Lessee that funds be invested therein, and subject to the approval of the Lessor and the Lessee as to the price at which such investments can be made. The Lessor may, with the written consent or upon the written request, of the Lessee, at any time sell and dispose of securities so purchased, and the net proceeds from such sale or sales shall be subject to the provisions hereof relative to said Depreciation Fund. In the event the Lessee exercises its option to purchase the demised premises as herein provided for, the Lessor shall sell and dispose of such securities (other than Land Trust Certificates issued under said Agreement and Declaration of Trust) and the net proceeds thereof shall be subject to the provisions hereof relative to said Depreciation Fund. In such case said Land Trust Certificates shall be held by the Lessor, who shall make distribution thereon by crediting the amounts otherwise distributable thereon on such purchase price as hereinafter provided.

If so requested in writing by the Lessee, the Lessor, as Trustee under the Declaration, will call for purchase shares evidenced by said Land Trust Certificates for the Depreciation Fund, in the manner and according to the terms set forth in Section 6 of Article V of the Declaration.

SECTION 3. The Lessee may, with the consent of the Lessor, make the aforesaid quarterly payments or any thereof or any part thereof, into said Depreciation Fund by delivering securities acceptable to the Lessor and at a price approved by the Lessor and within the class of securities available for the investment of such funds. In the event the Lessee has at any time paid into such Fund in cash or securities as above provided, an amount in excess of the accumulated quarterly payments hereinabove provided for, such excess shall be treated as a credit on subsequent payments, otherwise required to be made.

The Lessor may also pay out moneys or proceeds of securities in the Depreciation Fund in the amounts and under the conditions specified in Sections 2 and 3 of Article III of the Declaration.

SECTION 4. The Lessor may, in case the Lessee fails to make any payment or payments required to be made by the Lessee under the provisions of this Lease, or in case the Lessee fails to pay to the Lessor promptly from time to time the rentals or other payments reserved and provided for under this Lease as required by the terms hereof, or in case the Lessee fails to perform or comply with any other provision, covenant or condition of this Lease, withdraw from said Depreciation Fund and apply to such payment or payments

or to such rental payment or payments, or to the performance of any such provision, covenant, or condition, a sum sufficient to
81 fully pay, satisfy, and perform the Lessee's obligation or obligations in respect thereto, and in case the Lessor has advanced moneys for and on behalf of the Lessee under the provisions of this Lease may reimburse itself by withdrawing from said Depreciation Fund the amount of such advancement or advancements with specified interest thereon. In any of such events the Lessor may, without the consent of the Lessee and without notice, at private sale or sales and at a price or prices within the absolute discretion of the Lessor (it being specifically understood and agreed that the Lessor, in its individual capacity as distinct from Trustee, may purchase as such sale or sales), sell and dispose of any of the securities contained in the Depreciation Fund to the extent necessary to supply said Depreciation Fund with cash funds sufficient to permit such withdrawal or payment; in which event the Lessee shall, upon written notice from the Lessor and within thirty days thereafter, make further and additional payments into said Depreciation Fund to the extent of the amount which the Lessor has withdrawn therefrom, together with interest at the rate of Eight Per Cent. (8%) per annum computed quarterly under the provisions of this Section.

SECTION 5. The Lessee agrees to promptly pay and satisfy any tax, taxes, or charges which may be due and payable by the Lessee or the Lessor on account of said Depreciation Fund or securities included therein, and the income thereon, and the Lessor shall have full power and authority to advance sums so due and payable, but defaulted in by the Lessee, under the terms, provisions, and conditions hereinabove provided in connection with the payment of the Lessee's obligations by the Lessor.

SECTION 6. Said Depreciation Fund and the securities included therein shall be and remain the property of the Lessee, transferred and deposited to and with the Lessor, however, for the purpose and purposes herein set forth and without any right in the Lessee to use, claim, or enjoy said Fund except to the extent and in the manner herein specifically set forth. Upon the termination of this Lease by the expiration of its stated term, said Fund and the securities included therein shall, without further act or deed by the Lessee, belong to and thereafter be and remain the property of the Lessor in the same manner as is in such cases made and provided with respect
82 to the demised premises, and shall be and become a part of the demised premises and shall be and constitute liquidated compensation to the Lessor on account of the depreciation in the value of the demised premises during the Lessee's occupancy thereof, and upon the happening of such event the Lessee does hereby sell, convey, assign, transfer, and set over unto the Lessor all the right, title, or interest of the Lessee in said Fund. Upon the termination of this Lease by the Lessor on account of the default of the Lessee hereunder, said Fund and the securities included therein shall belong to

and thereafter be and remain the property of the Lessor in the same manner as is in such cases provided with respect to the demised premises, and shall be and constitute a part of said demised premises and shall be and constitute liquidated compensation to the Lessor on account of the depreciation in the value of the demised premises during the Lessee's occupancy thereof and liquidated compensation to the Lessor for damages resulting from such default, and upon the happening of such event the Lessee does hereby sell, convey, assign, transfer, and set over unto the Lessor all the right, title, or interest of the Lessee in said Fund. Until the happening of such event as under the provisions of this Lease gives the Lessor the right and title to said Fund or the right to have recourse thereto, the Lessor shall have only a contingent interest therein as in this Lease provided. As used in this Article, the word "securities" shall include Land Trust Certificates issued under the Declaration.

Article Four

Option to Purchase and Rights Upon Condemnation, Etc.

Section 1. The Lessee in possession at the time of the exercise thereof shall, upon giving to the Lessor at least sixty days' written notice, have the right, option, and privilege of purchasing the Lessor's interest in and to all of the demised premises, for the sum of Three Million Six Hundred Five Thousand Dollars ($3,605,000) at any time on and after June 1, 1933, and up to and including May 31, 1938; for the sum of Three Million Five Hundred Seventy Thousand Dollars ($3,570,000) at any time on and after June 1, 1938, and up to and including May 31, 1948; for the sum of Three Million Five Hundred Thirty-Five Thousand Dollars ($3,535,000) at any time on and after June 1, 1948, plus in each case an amount equal to the unpaid accrued rentals to date of purchase, and all sums, if any, for which the Lessee is in default of payment hereunder, plus all unpaid expenses and/or charges of the Lessor and reasonable compensation to the Lessor as Trustee under the Declaration, for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, provided that there shall be credited on such purchase price:

(a) All amounts then in the hands of the Lessor as Trustee under the Declaration not otherwise due for distribution or payment under the terms of the Declaration; and

(b) Any net amounts then in the hands of the Lessor, received as compensation for the appropriation to public use of any part of the demised premises; and

(c) The amount of cash in the Depreciation Fund held by the Lessor, including the net proceeds of any securities, other than Land Trust Certificates, then held by the Lessor as part of the Depreciation Fund and to the extent the Lessor has Land Trust Certificates

in the Depreciation Fund, that portion of the option price distributable thereon; and

(d) The net unappropriated proceeds of any insurance then in the hands of the Lessor and/or Trustee of Insurance.

In the event of the due and proper exercise of the option to purchase said demised premises, and the payment of the purchase price as hereinabove set forth, the Lessor covenants and agrees to convey to the Lessee all of the Lessor's interest in and to said demised premises, and in the buildings, improvements, and fixtures thereon and the appurtenances thereunto belonging, by a conveyance or conveyances which shall contain covenants of special warranty only, free and discharged of this Lease, and any and all of the terms, covenants, and conditions hereof, and free and discharged from the Trust created by the Declaration, and free and clear of all liens and encumbrances, except such as the Lessee may have created or suffered or has agreed to pay by the terms of this Lease, accompanied by an abstract or certificate of title extended at the expense of the Lessee, to the approximate date of purchase, showing good and
84 unencumbered title to the interest held by the Lessor, passing under the conveyance or conveyances so made, the measure and quality of the title to be conveyed, however, being the title now held by the Lessor as to which the Lessee has advised itself and is satisfied therewith; provided, however, that in case either or both of the options contained in the respective leases described in Parcels 2 and 3 above shall have been exercised and the fee simple title to either or both of said parcels shall have been vested in the Lessor, then the measure and quality of the title to be conveyed as to such parcel or parcels, shall be that now held by the lessors under the lease specified in such parcel or parcels, as to which titles the Lessee has advised itself and is satisfied therewith.

Upon the execution of this Lease the Lessee has examined Abstracts of Title which have been deposited with the Lessor, and for itself, its successors and assigns, agrees that said Abstracts of Title show that at the time of the execution and delivery of the Lease the Lessor had a good, unencumbered, marketable title in fee simple to Parcel 1 of the demised premises and has good unencumbered marketable title to the leasehold estates specified in Parcels 2 and 3 of the demised premises, and that the lessors under said leases had at the execution and delivery of said leases, and now have good unencumbered marketable title in fee simple to the real estate described in said Parcels 2 and 3, and that an extension of said abstracts of title to the approximate date of the exercise of said option showing no liens or other encumbrances placed or suffered to be placed on said premises by the Lessor, or by anyone claiming by, through or under the Lessor, excepting the Lessee, and anyone claiming by, through, or under the Lessee will comply with the foregoing requirements and the Lessee will accept the same as showing a good and

clear title to the demised premises to be in the Lessor as herein provided.

SECTION 2. If during the term of this Lease or any extension or renewal thereof, a small portion only, that is, less than a substantial part of the demised premises, shall be appropriated to public use in any proper proceeding therefor, the amount of any compensation to be awarded to the Lessor and the Lessee hereunder shall be paid in the first instance to the Lessor, and the Lessee shall have the right to use and apply so much of the award for the buildings as is reasonably necessary to restore any building or buildings upon the demised premises not so appropriated, which may have been severed by reason of such appropriation or which shall need restoration on account of such appropriation, and the moneys shall be paid out in the same manner as hereinafter provided for the disbursement of insurance funds by the Trustee of Insurance. The balance of any funds received shall be paid into the Depreciation Fund. In the event, however, that all or a substantial part of the demised premises shall be at any time so appropriated, then the entire award shall be paid in the first instance to the Lessor, and the Lessee covenants and agrees to pay to the Lessor the option purchase price, as soon as the award upon condemnation shall have been paid, and upon payment of the option price as hereinbefore defined, the Lessee shall be entitled to the entire amount that may have been awarded to the Lessor and Lessee hereunder, and to a conveyance from the Lessor as upon the exercise of the option to purchase.

In no event shall there be any reduction or abatement in rent or other amounts payable by the Lessee to the Lessor, or in the option price, because of any appropriation to public use of any part of the demised premises.

SECTION 3. It is understood that the building standing on that part of the demised premises situated at the northwest corner of High and Town Streets is joined to the building standing on that part of the demised premises fronting on Town and Front Streets, in the said City of Columbus, by a bridge or structure extending over an alley known as Wall Street and running between and parallel to High and Front Streets in said city; that said bridge or structure was constructed and is being maintained by the Lessee under and by virtue of Ordinance No. 36,350 duly passed by the City Council of Columbus, Ohio, on May 25, 1925; that the grant of such right by said City Council to the Lessee was and is upon the condition that said Council shall have the right to order the Lessee, its successors or assigns, to remove said bridge or structure at any time and upon failure of said Lessee, its successors or assigns, to remove said bridge or structure within sixty (60) days from date of notice by said Council, the Council shall have the right to remove the same at the cost and expense of the Lessee, its successors or assigns. The Lessee covenants and agrees with the Lessor that it will

not voluntarily remove, change or alter said bridge or structure except under the conditions and in the manner provided in Article Nine hereof.

Lessee further covenants and agrees that if it or the Lessor, shall be ordered by said City Council to tear down, remove, change or alter said bridge or structure, and if, within sixty (60) days after receipt by the Lessee or the Lessor of said order from said City Council, said order of the City Council shall not have been revoked, or suspended, then the Lessee shall proceed to comply with the order of said Council; and if, pursuant to such order, the Lessee shall be required to tear down and remove said bridge or structure, it shall do so at its own cost and expense, and it shall immediately at its own cost and expense repair, remodel and construct said building so joined as aforesaid in conformity with the general architectural plan and design of said buildings having regard for the purposes for which they shall respectively be used.

In the event of the removal, change or alteration of said bridge or structure as herein provided, the Lessee shall not, by reason thereof, be entitled to any abatement or reduction in the rentals or other payments required to be made under this Lease, nor in the option price herein specified.

Article Five

TAXES, ASSESSMENTS, ETC.

And as a further consideration for the leasing and demising of said premises, as aforesaid, the Lessee further covenants and agrees to bear, and in due season, from time to time, duly pay and discharge, in addition to said rent reserved, all taxes, assessments, rates, charges and levies, general and special, ordinary and extraordinary, of every name, nature and kind whatsoever, which may at any time and until the expiration of said term be taxed, assessed, charged, levied or imposed upon the said demised premises, or any part thereof, or upon any and all buildings, additions or improvements that may at any time during the continuance of said term, be, stand, or be placed upon, or form a part of, said demised premises and which may be taxed, assessed, charged, levied or imposed upon any estate or interest in said demised premises, buildings, additions or improvements (including also the estate or interest of the
87 Lessor, or of the owner or owners of the reversion thereof, in the reversion thereof, or any part thereof), or arising in respect to the occupancy or possession of the leased premises; and the Lessee further covenants and agrees that it will not become delinquent, nor suffer said demised premises to become delinquent, in respect to the payment of all or any of such taxes, assessments, rates, charges and levies, but will pay and discharge the same before such delinquency and before the commencement of any sale, or forfeiture, of said demised premises on account, or by reason, of the non-pay-

ment or non-discharge thereof, and also before any penalty or costs may accrue thereon, by reason, or on account, of the non-payment thereof. Each and all of such payment shall be made by the Lessee in the name of the Lessor, and the Lessee shall deliver, and hereby agrees to deliver, or cause to be delivered, to the Lessor, within thirty (30) days after each and every payment, but before the commencement of any sale or proceeding at which said demised premises might be sold or forfeited if any such taxes, assessments, rates, charges or levies were not paid, a proper and sufficient duplicate receipt or receipts (properly executed), showing such payment.

In case of any separation, division, or apportionment under the authority or requirement of any law, of any tax, assessment, or levy, that may be taxed, levied or imposed upon the said demised premises, or upon any building or improvement at any time thereon, between the Lessor and the Lessee, or their respective estates, the Lessee (and not the Lessor) shall nevertheless pay, and hereby agrees to pay, the entire tax, assessment, or levy taxed, levied or imposed upon the said demised premises or any building or improvement at any time thereon. The Lessee will also promptly pay to, reimburse, and save harmless the Lessor, from any tax, levied or assessed upon the rentals and/or other payments made under this Lease, and any income tax or taxes upon the Lessor or upon the income of the Lessor, as Trustee under said Declaration, because of the receipt by it of the rentals and/or other payments made under this Lease. It is not intended that the Lessee shall pay, and the Lessee shall not be required to pay, any so-called inheritance or transfer taxes, growing out of any inheritance, transfer, or devise of the estate of the Lessor, or of any interest in the reversion of said demised premises, or any income tax or taxes levied or assessed upon the holders of the Land Trust Certificates issued under the Declaration, whether or not collected at the source.

88 The Lessee further covenants and agrees that in addition to other taxes, assessments, rates, and charges to be paid by it, it will pay any charges or rental imposed, levied or exacted by any lawful public authority for any use of any space or appurtenances on, under or above any sidewalk, street, or alley adjacent to the real estate hereby demised, and used in connection therewith.

The Lessor covenants and agrees that if there shall be any rebates on account of any rates, taxes, assessments, charges or impositions paid by the Lessee under the provisions of this Lease, such rebates shall belong to the Lessee, and the Lessor will, upon request of the Lessee, sign any receipts that may be necessary to secure the payment of any such rebates, and will pay over to the Lessee such rebates received by the Lessor.

It is expressly agreed, however, anything contained in this Article Five to the contrary, that the Lessee shall not be required to pay, discharge, or remove any taxes, assessments, rates, charges, or levies against the demised premises or any part thereof which the Lessee

may deem illegal or excessive, or to pay any judgment rendered therefor so long as the Lessee shall at its own expense, in good faith, contest the same or the validity thereof by proper proceedings which shall operate to prevent the collection of the judgment, tax, assessment, lien or imposition so contested and/or the sale of said premises or any part thereof to satisfy the same; provided, however, that if the amount in dispute is $25,000 or more, the Lessee shall furnish to the Lessor indemnity satisfactory to the Lessor, against any loss or damage by reason of its failure to pay the same, or against any loss, costs, or damages occasioned by such contest, and that pending any such legal proceedings the Lessor shall not have the right to pay, remove, or discharge such tax or assessment thereby contested.

Article Six

REPAIRS AND INSURANCE

Section 1. And as a further consideration for the leasing and demising aforesaid, the Lessee further covenants and agrees that the Lessee will, during the continuance of this Lease and all renewals hereof, at its own cost and expense, keep and maintain any and all buildings and improvements that may at any time
89 during the said term, be or stand, or be erected or placed upon said demised premises, in a safe, tenantable, and good condition, order and repair; and, for the additional security and protection of the Lessor, will also at the Lessee's own cost and expense, keep and maintain, or cause to be kept and maintained, the same properly insured against loss or damage by fire in an amount equal to the full insurable value thereof, exclusive of foundations, and insured against loss or damage by tornado or windstorm in an amount equal to fifty per cent (50%) of the full insurable value thereof, exclusive of foundations, all in and with good and responsible insurance companies and/or associations authorized to do, and doing business in the State of Ohio, and such as may from time to time be satisfactory to the Trustee of Insurance hereinafter referred to, the right being at all times expressly reserved and granted to said Trustee (who shall not, however, be held charged with any duty or obligation, to pass upon any company and/or association or any policy of insurance, or to have assumed any liability either in so doing, or in omitting so to do, or any responsibility or risk whatever in the premises) either before or after the issuance of any policy or at any time during its term, in the exercise of its reasonable discretion to disapprove any company and/or association, or to reject or require said Lessee to reject, any policy which the Lessor may regard unsatisfactory or insufficient, and to require a new policy in the place of any so disapproved or rejected.

And the Lessee shall, and hereby does agree that the Lessee will, for the additional security and protection of the Lessor properly

assign to, or cause to be assigned, or by sufficient stipulation therein, or endorsement thereof, by the insurer, cause the loss under each and every of the said policies of insurance to be made payable to The Huntington National Bank of Columbus, as Trustee of said insurance, or such other bank or trust company in the City of Columbus as may be designated in writing from time to time by the Lessor, and to the extent that the same may be reasonably procurable, the policies shall provide that loss thereunder shall be payable to the Trustee of Insurance, notwithstanding any action or omission of the Lessee which might forfeit its rights thereunder, the insurers being subrogated to any right of action against the Lessee for such action or omission, and will immediately upon its issuance deliver to, and deposit with, such Trustee, each and every such policy so issued from time to time and required to be made payable to such Trustee, as aforesaid, to be taken and held by the Trustee for the security and protection of the Lessor, and the loss, if any thereunder, to be applied as by this Article of this Lease provided.

The policies of insurance may, at the option of the Lessee, be in such form as to cover loss or damage not only to the buildings and improvements but also to the fixtures therein, but in such event the policies shall provide that the loss shall be payable thereunder to the Trustee of Insurance in the full amount of the loss or damage to the buildings and improvements, and the balance, if any, of such insurance moneys, may be made payable by said policies to the Lessee.

The Lessee further agrees that it will, from time to time, and as often as requested by the Lessor, furnish it with receipts or other satisfactory evidence, showing the premiums on all policies to have been paid. Every new policy of insurance (or renewal of any old policy) required to be delivered to the Trustee under the provisions of this Article, shall properly conform to the requirements of this Article and (so conforming) shall in each and every instance be delivered to the Trustee at least five (5) days prior to the expiration of the old policy.

SECTION 2. While any new building or improvements required or authorized under the provisions of this Lease shall be in the course of erection or construction, the Lessee shall, and hereby agrees to, procure and keep and maintain insurance thereon, conforming to all the requirements aforesaid, so soon and as rapidly as such insurance is obtainable from good and responsible insurance companies and/or associations, and make the loss under such policies of insurance payable, and deliver the policies as aforesaid.

SECTION 3. It is further covenanted and agreed that the Lessee will place insurance and will at all times and at its own expense keep the Lessee and the Lessor insured against general accident liability and will also maintain accident and casualty insurance on account of the boilers and elevators at any time on the demised premises, covering both the Lessor and the Lessee, in responsible companies

and/or associations, satisfactory to the Trustee of Insurance, in such amounts as may be required or approved by the Trustee of Insurance; and that in case of loss or damage to the building or
91 improvements at any time upon said demised premises by reason of casualty or accident to said boilers, or in case of damage to elevators or boilers, all and singular the provisions, conditions, covenants, and agreements of every nature, description, and character in this Lease contained relating to loss, damage, or destruction by fire, and deposit of policies and the payment or disposition of moneys thereunder, shall be applicable in like manner to any loss, damage, or destruction by accident or casualty as aforesaid, and the Lessee covenants and agrees during the terms of this Lease to save the Lessor and its interest in the demised premises harmless from any loss or damage on account of injury or accident to life, person, or property, by casualty or accident to and by such boilers and elevators as herein provided, or from any other cause.

SECTION 4. In case of loss or damage to, or the destruction by fire or otherwise, of any of the buildings and improvements at any time upon the demised premises, and as often as any such buildings or improvements shall suffer loss or damage or be destroyed by fire or otherwise, the Lessee will, with all reasonable diligence and in any event within four (4) months after any such loss, damage, or destruction, begin the work of reconstruction, repair, and/or replacement, and will, within twenty-four (24) months after such loss, damage, or destruction, repair or rebuild the same to a condition equal to or better than the former condition thereof or at least to the condition in which the same should have been at the time of the casualty, or will erect a new building or buildings in conformity to the provisions of Article Nine hereof, and the Lessee will pay for such repairing or rebuilding so that the demised premises and the buildings and improvements at any time situated thereon shall be free and clear from any and all mechanics' liens and other liens. The preparation of architects' plans shall be deemed work of construction.

No damage to or destruction of any of the buildings or improvements or any part thereof on the demised premises, by fire or otherwise, shall entitle the Lessee to surrender possession of the demised premises or terminate this Lease, or release the Lessee from liability to pay rent, taxes, and other charges, which by the terms of this Lease it is required to pay, any law now or hereafter in force to the contrary notwithstanding.

92 SECTION 5. In case of loss or damage to the buildings and improvements at any time upon the demised premises, or the destruction thereof, then all insurance moneys which have been received by the Trustee of Insurance under said policies on the buildings and improvements at any time situated on said premises shall be held, used, and disposed of by the Trustee of Insurance as follows:

First: If at any time that any such insurance money comes into the possession of said Trustee of Insurance, the Lessee is in default

in the payment of any rent, tax, assessment, lien, or other charge or payment, which by the terms of this Lease has been agreed to be paid by the Lessee, or if such default shall occur during the time said insurance money, or any part thereof, is in the possession of the Trustee of Insurance, then the Lessor shall have the right, upon demand, to require the Trustee of Insurance to pay over to the Lessor so much of the insurance money as may be necessary fully to pay or discharge any such sum of money for the payment of which the Lessee is in default as aforesaid, and this the Lessor may demand and require whenever and as often as any such default shall have occurred on the part of the Lessee. Nothing herein contained, however, shall be construed to permit the Lessee to default in the payment of the rentals or other charges hereinbefore stipulated, or in the performance of the other covenants of this Lease, and the Lessor may, at its option, in case of default in the payment of such rentals or other charges or default in the performance of any other covenant in this Lease, proceed against the Lessee for the collection of such rentals and charges, and may re-enter and take possession of the premises herein demised in accordance with the provisions of this Lease hereinafter set forth, without prejudice to its rights to the benefit of such insurance money as security for the payment of such rentals and other charges; and if such fund shall become depleted by reason of the application therefrom of amounts as hereinbefore provided for, with respect to which the Lessee shall have been in default, the Lessee shall, upon thirty (30) days' written notice from the Lessor or the Trustee of Insurance, deposit with the
93 Trustee of Insurance additional cash in an amount which will compensate for such depletion.

Second: If the Lessee, upon such loss, damage, or destruction, shall proceed to repair or rebuild or construct a new building or buildings on said demised premises in place thereof, in conformity with the requirements of this Lease and within the time and under the conditions hereinbefore specified, then and in that case all insurance moneys so received by the Trustee of Insurance which are not used or necessary to be used to make good any default in payment as in the preceding paragraph provided, shall be paid out by the Trustee of Insurance, from time to time, as the work progresses, upon certificates or contractors' estimates, made or approved by an architect or an engineer satisfactory to and approved by the Trustee of Insurance, for the cost and expense of such repairing, rebuilding or construction of said new building or buildings, it being understood and agreed that the Lessee will produce and show to the Lessor and to said Trustee of Insurance, upon request of the Lessor and/or such Trustee, all original bills, receipts and vouchers for services, labor and material employed and used in repairing or rebuilding and in the construction of such new building and improvements, but an amount of such insurance shall at all times be retained by the Trustee of Insurance sufficient in the opinion of

such Trustee to pay for the completion of buildings and improvements or the repair or rebuilding thereof, in conformity with the requirements of this Lease, free from liens, the intention of the parties hereto being to provide, and the Lessee so agrees, that the moneys last expended in paying for the repairing, rebuilding, or construction of a new building and improvements shall be the insurance moneys aforesaid, and upon completion of said building and improvements or of said repairs and rebuilding, discharged of all liens of mechanics, laborers, or materialmen or others, or the possibility thereof, any insurance money then remaining in the hands of the Trustee of Insurance hereunder shall be paid to the Lessee, and it is expressly understood and agreed that no person furnishing any labor or material or service for the repairing or rebuild-
94 ing or construction of any building or improvements at any time upon the demised premises shall have any lien upon the Lessor's interest in the demised premises, and that any and all liens upon the Lessee's estate and interest in said demised premises and the improvement situated thereon shall be subject to the rights of the Lessor under the terms and provisions of this Lease.

In the event the Lessor shall be of the opinion that the proceeds of such insurance will not be sufficient to repair or restore the buildings and improvements damaged as aforesaid, and shall, in writing, so advise the Lessee, the Lessee shall thereupon furnish to the Trustee of Insurance such additional sums of money as shall be necessary, together with the proceeds of such insurance, to repair or restore the buildings as aforesaid. A certificate of an architect or engineer, approved by the Trustee of Insurance, as to the amount of money required as aforesaid, shall be conclusive upon the parties hereto and shall be sufficient authority to the Trustee of Insurance for disbursement of the proceeds of such insurance money as hereinbefore provided, and the Trustee of Insurance shall not be required to make any disbursements of the proceeds of such insurance unless and until it shall be supplied with the funds necessary as aforesaid to repair or restore such damage.

It is expressly understood and agreed, however, that in case such loss or damage to the buildings or improvements at any time upon said demised premises shall not exceed a repair or replacement cost of One Hundred Thousand Dollars ($100,000), then upon restoration and repair of said buildings and improvements the Trustee of Insurance shall pay over to the Lessee the proceeds of policies covering such loss upon receipt from the Lessee of an affidavit by one of its executive officers, reciting that said buildings and improvements have been repaired and restored to as valuable and serviceable condition as existed and should have existed before said fire; that the cost of said repairs and restoration has been paid by the Lessee; that the actual cost and expenditure is the amount stated in the affidavit, and that the said repairs and restoration have been made

completely discharged of all liens of mechanics, laborers, material-men, and others, and the possibility thereof.

SECTION 6. In the event any building or improvement at any time situated upon said demised premises shall not be rebuilt or repaired or a new building or improvements constructed in place thereof, within the time hereinbefore specified, regardless of the adjustment of any loss under any insurance policy, then the Trustee of Insurance is hereby authorized and directed to pay over to the Lessor, upon written demand from the Lessor, all insurance moneys in the hands of the Trustee of Insurance after deducting therefrom its costs connected therewith, to be retained by the Lessor as liquidated damages hereby agreed upon by reason of such breach of covenant in regard to repairing, rebuilding, or constructing a new building or improvements in conformity with the terms of this Lease, and not as a penalty or in the nature thereof, but nothing herein contained shall be construed as a waiver on the part of the Lessor of its right under this Lease to terminate this Lease on the ground of the failure of the Lessee so to repair or rebuild as herein provided, and nothing herein contained and no act of the Lessor or of the Lessee under any provision of this Lease shall be construed as a waiver on the part of the Lessor of its right under this Lease to terminate this Lease for the failure of any other covenant herein contained to be kept and performed by the Lessee for which the same would otherwise be forfeited, and in the event of such termination, no compensation shall be allowed to the Lessee for any buildings and improvements upon the premises, but such buildings and improvements shall be the property of and belong to the Lessor.

If this Lease shall be terminated for any reason whatever other than by the exercise of the option to purchase while any insurance money shall remain in the hands of the Trustee hereunder or uncollected, then all of said insurance money in the hands of the Trustee of Insurance hereunder at the time of such termination or subsequently collected by it shall, after deducting therefrom its costs and reasonable charges connected therewith, belong to and be paid over to the Lessor as its own money, free and clear of any claim or interest thereon, on the part of the Lessee or anyone claiming through or under the Lessee.

SECTION 7. The Trustee of Insurance shall in no event be liable or responsible for the collection of any insurance moneys or for the failure or refusal of any insurance company or other insurer to pay any moneys due or any part thereof, or to pay any such moneys to the Trustee of Insurance or to liquidate any loss in full, but the Trustee of Insurance shall be liable and responsible only for such insurance moneys as shall actually come into its or its agents' possession, less the expense of collection, if any, and the Trustee of Insurance may agree upon and accept any adjustment of any loss which may be made by the Lessee, and if the

Lessee shall not have adjusted the loss within four months after the date of loss or damage, then the Trustee may agree upon or accept any adjustment of any loss which it deems proper, and upon such acceptance thereof by the Trustee of Insurance, the Lessee will agree thereto, and, if requested in writing, ratify the same, and the Trustee of Insurance shall not be required to obtain affidavits or certificates under the mechanics' or other lien law, and may advise with counsel selected or approved by it and shall be protected in acting upon such advice. All costs and expenses of the Trustee of Insurance shall be paid by the Lessee upon demand either of the Lessor or Trustee of Insurance therefor and if not so paid, may be deducted from the insurance moneys then held by the Trustee of Insurance.

ARTICLE SEVEN

COVENANT AGAINST LIENS AND WASTE

SECTION 1. And the Lessee does further covenant and agree that it will not permit or suffer any lien to be put upon or arise or accrue against said premises or against any building or improvement that may at any time be, stand, or be placed thereon, in favor of any contractor, materialman, manufacturer, builder, mechanic, workman, or other person who may furnish any material, apparatus, machinery or fixtures therefor, or for, upon, or under any walk, sidewalk, space, area, or street bordering thereon, or connected therewith or for any appurtenance to said premises, building, or improvement, or furnish or perform any services or labor in, upon, about, or in connection with the said premises at any time, nor permit or suffer any lien of any other nature that may affect the estate, interest, rights, or security of the Lessor to be charged upon or accrue against said premises or any such building or improvement, by reason of any act of commission or omission of the Lessee, or anyone claiming or holding by, through, or under the Lessee; provided that this restriction shall not be taken to refer or have application to any mortgage, or deed of trust in the nature of a mortgage, created in the manner and under the conditions hereinafter in Section 2 of Article Twenty-seven of this Lease expressly permitted. And the Lessee does further covenant and agree to hold and keep the Lessor and the said premises and any building or improvement that may at any time be or stand thereon, harmless from and free of any and all liens, or right or claim of lien, on or against said premises or building or improvement, which may, or might, arise or accrue under any act of the State of Ohio now or at any time hereafter in force relating to mechanics' liens, on account or by reason of any materials fixtures, apparatus, or machinery which may be furnished, especially manufactured or prepared, for or on account of said premises or any such building, or any appurtenance of said premises or building, or on account or by reason of any labor or services which may

97

be furnished or performed in, upon, or about such premises, or any such building.

SECTION 2. And the Lessee covenants and agrees that it will not commit, permit, or suffer any waste of, upon, to, or about said premises or the building or buildings or improvements that may at any time be thereon, or do or permit to be done anything tending to injure the same, or to impair or diminish the value thereof; provided, however, the Lessee may, as provided in Article Nine hereof, remove said building or buildings for the purpose of replacing the same with other buildings.

ARTICLE EIGHT

ADVANCES BY LESSOR UPON LESSEE'S DEFAULT

SECTION 1. In case of the nonpayment of, or failure of the Lessee to pay and discharge any taxes, assessments, rates, charges, or levies, as hereinbefore provided, or in case of the failure of the Lessee to insure or to keep or maintain insurance, as aforesaid, or to pay the premiums thereon, or to make the loss under said policies payable, as aforesaid, or to deliver the same, as aforesaid, to the Trustee, or in case of waste, or in the event of any other breach of, or default in, any of the provisions, covenants, or conditions of this Lease, then the Lessor may, at its option, but without any obligation so to do and without prejudice to any other right of the Lessor hereunder, or otherwise, arising in consequence of such breach or default, procure or effect such insurance (no policy, however, so procured or
98 effected at any one time to extend beyond a term of five years), or pay such taxes, assessments, rates, charges, or levies, or redeem from any sale or forfeiture made because of the nonpayment thereof, or buy in any tax title, or remove any or all liens, encumbrances, or clouds upon said premises, or upon any building or improvement at any time thereon, or expend whatever moneys may be necessary to repair, protect, or preserve said premises or property, or to restore the same as herein agreed or to cure such breach or default; and the amount of any and all payments so made in that behalf, as well as all other moneys or sums advanced or expended by the Lessor under the authority of, or pursuant to, any of the terms or provisions of this Lease, or because, or on account, of any default or breach of the Lessee in the performance or observance of any of the covenants or conditions of this Lease to be kept, observed, or performed by the Lessee, shall be forthwith repaid by the Lessee to the Lessor, together with interest thereon at the rate of Eight Per cent. (8%) per annum payable quarterly from the date of payment thereof by the Lessor, to the date of repayment thereof to the Lessor by the Lessee, and shall be deemed and taken, and are hereby declared to be, so much additional and further rent for the above demised premises, due immediately from and payable by the Lessee, and may be collected in the same manner as hereinafter provided for the collection of other rents

to accrue hereunder, and shall be regarded as rent under the provisions of this Lease.

SECTION 2. In paying any taxes, assessments, rates, charges, or levies, or redeeming from any sale or forfeiture made because or in consequence of the nonpayment thereof, or buying in any tax title, or removing any lien or encumbrance, the Lessor shall be required to exercise only such ordinary care as is usually exercised by prudent men of business in respect to ascertaining the existence or validity of any such tax, assessment, rate, charge, levy, sale, forfeiture, tax title, lien, or encumbrance, and the Lessor shall not be bound to exercise any greater care; and the Lessor shall not, before expending any moneys in that behalf, as herein authorized, be bound to determine definitely, or have adjudicated, the validity of any such tax, assessment, rate, charge, levy, sale, forfeiture, tax title, lien, or encumbrance; provided however, always that if there shall be probable cause for regarding any tax, assessment, rate, charge, or levy,
99 or any lien or encumbrance, illegal or invalid, and the Lessee shall in good faith desire, or seek, to contest the same, then the Lessee may, upon giving written notice thereof to the Lessor, before any such payment or removal by the Lessor, as aforesaid, and at the time of such notice if the amount in dispute is $25,000 or more, depositing with the Lessor good and sufficient security, by bond or otherwise, satisfactory to the Lessor in character and amount, contest the validity of any such tax, assessment, rate, charge, levy, lien, or encumbrance, provided the Lessee shall prosecute such contest in good faith and with all due diligence; and the security so deposited with the Lessor shall be held by it until said premises shall be relieved and disencumbered of any such tax, assessment, rate, charge, levy, lien, or encumbrance, or claim therefor, and to protect and indemnify the Lessor against any loss, damage, costs, and expenses (including any reasonable attorney's or counsel fees) that the Lessor may sustain, be put to, or incur in the premises, and shall be so applied by the Lessor, and the balance, if any, remaining of any security so deposited with the Lessor, or the proceeds thereof, shall, after said premises shall have been relieved and disencumbered as aforesaid, be returned to the Lessee, provided that the Lessee shall not at the time be in default in the performance or observance of any of the covenants or provisions of this Lease on its part to be kept, performed, or observed.

ARTICLE NINE

CONSTRUCTION OF NEW BUILDING, REMOVAL OF BUILDINGS, ETC.

SECTION 1. The Lessee further covenants and agrees that no building or improvement which shall at any time during the term hereof be located upon the leased premises, shall be torn down or removed, without the consent, in writing, of the Lessor, except as herein otherwise expressly provided,

The Lessee may, when not in default in the performance or observance of any of the covenants and agreements herein required to be kept, observed and performed by the Lessee, tear down or remove from said demised premises any building or buildings at any time situated thereon, for the purpose of replacing the same with another building or buildings.

The Lessee, before commencing to tear down or remove any
100 such building or buildings at any time situated on the demised premises, and before commencing to do any work in connection with the construction of such new building or buildings, and before letting any contract in connection therewith, shall and hereby agrees to deposit with the Lessor, moneys or securities which the Lessor may in writing approve, in an amount not less than the value of the building or buildings then standing on the demised premises and which the Lessee shall propose to tear down or remove. In all such cases hereunder the Lessee shall, at least thirty (30) days before commencing to remove or tear down any building or buildings on said demised premises, for the purpose of constructing any new building or buildings, furnish the Lessor with one complete set of plans and specifications covering the construction of the proposed new building or buildings together with a sworn statement of a reputable architect or engineer of good standing in the City of Columbus, approved by the Lessor, showing the estimated total cost of such building and improvements. If such cost shall exceed the value of the building or buildings to be torn down or removed, the Lessee shall before beginning such tearing down or removal, show to the satisfaction of the Lessor that the balance of the moneys requisite to pay for the new building or buildings has been provided for and their application to such purposes assured. The Lessee shall also furnish opinion of counsel satisfactory to the Lessor, that such building or buildings can lawfully be constructed according to the plans proposed.

The Lessee further covenants and agrees, within twenty-four (24) months from the date of commencing under this Article to tear down or remove any such building or buildings at any time hereafter erected on the demised premises, to construct and complete, ready for use and occupancy, a new building or buildings to take the place thereof upon the said demised premises, which building or buildings shall be built in accordance with the laws and ordinances then in force in the State of Ohio and the City of Columbus, and shall have a reasonable cost and value which, together with the value of the building or buildings to remain standing upon the demised premises, shall aggregate not less than Three Million Five Hundred Thousand Dollars ($3,500,000), and shall, unless the Lessor shall consent in writing to the construction of another type of building, be a business building, adapted to office, commercial or mercantile pur-
101 poses. Any new building or buildings constructed as aforesaid shall be erected and completed by the Lessee, ready for use

and occupancy and at the Lessee's sole cost and expense, free and clear from all liens or claims of contractors, subcontractors, mechanics, architects, laborers, and materialmen, and all liens or claims of any kind or character suffered or permitted by the Lessee or arising under the laws of the State of Ohio, or otherwise, or the possibility thereof. Any buildings or improvements constructed as aforesaid shall be constructed only in accordance with plans and specifications hereinbefore provided to be furnished to the Lessor, with such changes only as shall be approved in writing by the Lessor, except such changes which involve an increase or reduction in aggregate cost not in excess of One Hundred Thousand Dollars ($100,000), and no work of construction shall be contracted for or commenced until such plans and specifications have been approved, in writing, by the Lessor or upon arbitration as hereinafter provided, except that so long as The F. & R. Lazarus & Company, or its successors in the business now conducted by such Company, shall be Lessee hereunder, approval of the plans by the Lessor shall not be required as to any alteration or reconstruction of buildings upon the demised premises, intended for use for mercantile business substantially as now carried on by said Company.

Whenever the Lessee is required, under the terms of this Lease, to keep the demised premises and the buildings and improvements thereon free from liens or claims, or to erect or complete work of construction, erection, remodeling, or repairs of buildings, free of liens of contractors, subcontractors, materialmen, laborers, or any rights thereto or other claims arising in the course of such work, the Lessee, nevertheless, if it in good faith disputes the validity or correctness of any such lien or right thereto, may refrain from paying the same, providing that it shall proceed with due diligence to conduct any necessary or proper proceeding or litigation for the purpose of determining the correctness or validity thereof, and the Lessee shall not, so long as it shall in good faith maintain such litigation, be deemed to be in default with respect to such covenant on the part of the Lessee (providing that if the amount in dispute is in excess of Twenty-five Thousand Dollars ($25,000) the Lessee shall, if the Lessor so requires, furnish to and maintain with the Lessor security satisfactory to the Lessor, in one and one-half times
102 the amount so in dispute, for the purpose of holding the Lessor and the demised premises harmless and free from any liens, cost, damage, claim, charge, or expense of any kind resulting from such disputed lien, claim, or right).

In lieu of furnishing security by way of depositing money or securities in all cases in this Article Nine provided, the Lessee may execute and deliver to the Lessor a good and sufficient surety bond in principal amount equal to the amount of moneys or securities which the Lessee would otherwise be required to deposit, with surety approved by and satisfactory to the Lessor, conditioned to the satisfaction of the Lessor on the construction and completion of any

such building or buildings, free from liens or the possibility thereof as aforesaid.

The Lessee shall have the right from time to time to substitute for any securities so deposited, cash in amount equal to the value of the securities so deposited, and any money deposited with the Lessor shall be paid out from time to time, together with any interest or earnings accruing on said money or securities, for such construction work, in the manner and upon like conditions provided in Section 5 of Article Six hereof.

In the event that the Lessee shall make default in any of the provisions of this Lease with reference to the erection of any new building or buildings upon the demised premises, then and in each and every such case and forthwith upon each and every such failure, the Lessor may itself proceed, but is not required, to do and perform such work of construction, using and expending any moneys or other securities which may be in its possession applicable to such construction, for the purposes aforesaid, and for such expenses and outlays incident thereto as the Lessor may consider necessary to incur, all without the concurrence of the Lessee, and in such event full and unconditional consent, authority, and approval are hereby given by the Lessee to the Lessor to use, expend, and apply such funds in such manner and through such parties and upon such terms as the Lessor may consider advisable. In any such event the Lessee releases the Lessor from any and all liability and responsibility in respect to the prosecution of such work and in respect to all expenditures of such money as aforesaid, and from all acts of omission and commission upon the part of the Lessor, its agents, contractors, 103 and others whatsoever. All expenses, including reasonable compensation of the Lessor, its architects and other agents, incident to carrying out any of the matters or things referred to in this paragraph, shall be borne by the Lessee, and in the first instance paid from said deposited moneys or securities in the same manner as expenses for construction.

If there be no money or securities on deposit with the Lessor for the purposes aforesaid, the Lessor may, upon the security of the bond to be furnished as aforesaid, or otherwise, proceed to perform such work of construction.

The Lessee agrees that any application of said moneys or securities by the Lessor or its action in any respect under this Article shall not operate to waive, impair, abate, or affect the liability of the Lessee under any of its covenants hereunder or any of the rights of the Lessor in this Lease provided, it being understood that the rights conferred upon the Lessor by this section are cumulative and in addition to all other rights and remedies under this Lease, all which rights and remedies shall remain unaffected by this section.

In case any Surety Company acting as surety upon any bond herein provided for shall, during the life of such bond, cease to do business in the State of Ohio, or its capital shall become impaired

or the Lessor shall at any time be satisfied that said Surety Company has become irresponsible or such bond insufficient, then and in that event the Lessee will, within thirty (30) days from and after written demand of the Lessor, procure other good and sufficient surety satisfactory to the Lessor.

SECTION 2. In case the Lessor shall disapprove or fail, neglect or refuse to approve, in writing, any plans and specifications furnished by the Lessee to the Lessor, as provided in Section 1 of this Article, within thirty (30) days after the furnishing of any such plans and specifications to the Lessor, the plans and specifications of any such new building proposed to be constructed shall be such as shall have the written approval of a majority of three disinterested, competent, and experienced practicing architects in business in the City of Columbus, conversant with the construction of first-class, modern, fireproof buildings, and not related to any of the parties in interest by consanguinity or affinity, or officers or directors of any corporation a party hereto, who shall be selected in the following
104 manner, that is to say: the Lessee shall select one architect and notify the Lessor in writing of the person so chosen, and the Lessor thereupon and within fifteen (15) days thereafter shall select one architect and notify the Lessee in writing of the person so chosen, and the two persons so chosen shall, within fifteen (15) days thereafter, choose a third architect; and the three persons so chosen shall proceed forthwith to determine the merits of said plans and specifications and the form of construction proposed, and shall take into consideration the suitability and adaptability of the building to the said premises and their vicinity, and the plans and specifications and the form of construction, and to the requirements of law, and conformity to good building practice of said plans and specifications and form of construction, to the end that the proposed new building will reasonably produce an income to pay the rentals and other payments under this Lease, taxes upon the demised premises, and the operating expenses of such building, and that the value of the property will not be depreciated. The decision and award of said three architects, or of any two of them, reduced to writing, delivered to the parties hereto, shall be binding and conclusive of the matters aforesaid.

And in case of the refusal or failure of either of the parties hereto to appoint an architect as herein specified, or in case of the death, disability, inability, or refusal to act of either of the architects so appointed by either of the parties hereto, or of the third architect appointed by the two architects chosen by the respective parties hereto as hereinbefore provided, or in case the architects, appointed by the respective parties hereto, shall neglect or refuse to appoint, or be unable to agree upon, the third architect as hereinbefore provided, then and in any such case, either party hereto shall have the right to apply to any person then a judge of the United States District Court in and for the District in which the City of Columbus

may be located, for the appointment of an architect to act in the stead of the one refused or failed to be appointed by either of the parties as aforesaid, or to succeed the architect dying, disabled, unable or refusing to act as aforesaid, or to be the third architect in case of the neglect or refusal of the two architects appointed to appoint the third architect as aforesaid, or in case of their inability to agree upon the third architect as aforesaid; and any such per-
105 son so invested with power hereunder shall, upon satisfactory evidence being furnished to him that due notice of such application has been given as herein provided, have the power to appoint an architect or architects (as the case may be) of like qualifications as herein provided, who shall have the same powers, duties, and authority as though he or they had been selected in the method and within the time hereinbefore first provided.

The costs, expenses and reasonable compensation of the architects chosen to decide the foregoing matters shall be borne and paid by the Lessee.

SECTION 3. Any new building built upon the demised premises under the provisions of this Article Nine may be built or constructed in such manner as to be joined to or used in connection or conjunction with any adjoining building or buildings not located on any portion of the demised premises, or so as to be part of the same, or constitute with such adjoining building or buildings one entire building; and it is also understood that at any time after said new building has been constructed it may, by the Lessee, be joined to and used in connection with any adjoining building or buildings; provided, however, always, that in every case any such new building so to be erected, as aforesaid, shall be so planned, equipped, and constructed that the portion thereof located upon said demised premises can be at any time conveniently and practicably divided or partitioned off from the rest, or any adjoining building or buildings, and converted into a separate and complete building, standing wholly upon said demised premises (except that party walls may be used where the legal right to build and maintain the same for the benefit and support of the portion of the building on said demised premises is legally established and assured) and conforming to the requirements of all ordinances, laws, and regulations applicable to or regulating such a structure in force at the time of the erection of said new building.

With the written consent of the Lessor, the Lessee may grant easements of support in the walls of any building at any time on the demised premises, and may enter into party wall or joint use agreements therefor.

SECTION 4. The Lessee further covenants and agrees to and with the Lessor that the Lessee, at least fifteen (15) days prior to commencing any repairs, alterations, remodelings, improvements,
106 or additions to any building at any time on the demised premises, which are estimated to cost in excess of One Hun-

dred Thousand Dollars ($100,000), and at least fifteen (15) days prior to letting any contract in connection therewith, will do and perform the following:

(a) Furnish the Lessor with a complete set of the plans and specifications for such proposed work, together with a sworn statement by a reputable architect who is to have charge of such work, approved by the Lessor, as to the estimated cost thereof.

(b) Deposit with and assign to the Lessor, cash and/or securities approved by the Lessor, having an actual market value of not less than the estimated cost of such work, which cash and/or proceeds of securities shall be paid out in the same manner as insurance moneys so far as applicable.

Upon compliance with the provisions of this Section, but not otherwise, the Lessee shall have the right to make such repairs, alterations, remodelings, improvements, or additions as the Lessee may desire, provided the same do not diminish the value of the building then on the demised premises.

SECTION 5. It is further covenanted and agreed by the Lessee, for itself and for anyone claiming by, through or under the Lessee, and notice is hereby given, that no person, firm, or corporation furnishing labor, services or material to or for the Lessee or for or in respect of any construction work upon the demised premises, shall have any lien or claim against the estate of the Lessor in the premises, but all such rights or liens shall attach only to the leasehold interest of the Lessee and shall be subject to all of the rights, remedies and powers of the Lessor.

ARTICLE TEN

USE AND CARE OF PREMISES

SECTION 1. The Lessee hereby further covenants and agrees that at no time will any floor, or part, of any building which may at any time be upon the said premises, during the said demised term, be subjected to any greater load than such floor or part is designed and constructed to bear and shall be safely (and without any injury
107 or risk) capable of bearing, and that said premises and the building or buildings which may at any time be thereon shall, during the said demised term, be used only and exclusively for proper and lawful purposes, and that the Lessee will not use or occupy, or knowingly suffer or permit any person or body to use or occupy the same, or any part or portion thereof, in any manner whatsoever, for any purpose calculated or tending to injure the reputation thereof, or for any immoral or unlawful purpose, or for any purpose or use in violation of any law, statute, or ordinance applicable, governing or relevant, from time to time during the continuance of said term in force; and the Lessee will, at its own expense, keep and maintain every building and improvement which

may at any time be situate on said premises, and all the appurtenances thereunto belonging or pertaining, and the sidewalks, steps and any areas and excavations under the sidewalks, in, upon, around or about, or adjacent to said premises (in so far as the Lessee, or anyone claiming or holding under it or any occupant of said premises may have control of such sidewalks, steps, areas and excavations), in a good, safe, secure, clean, and sanitary condition, and will keep and maintain, as well as use and occupy said premises and every building or improvement at any time thereon, as well as the sidewalks, streets, and alleys around or about said premises, in conformity to and compliance with all ordinances, statutes, and laws applicable to or affecting the same, and will not commit, knowingly permit, or suffer, any violation or infraction of any such ordinance, statute, or law, and will protect and indemnify and forever save and keep harmless the Lessor from and against any penalty, fine, damage, expenses, or charges imposed, or assessed, or incurred for any violation or breach of any said ordinances, statutes, or laws whether occasioned by the act or neglect of the Lessee, or by any person or persons holding or claiming by, through or under the Lessee, or by any occupant of said premises, and will also protect and indemnify and forever save and keep harmless the Lessor from and against any loss, costs, damages and expenses, including all reasonable attorneys' and counsel fees, occasioned by, or arising out of, any breach or default in the performance or observance of any of the covenants, provisions, or conditions of this Lease, or occasioned by, or arising out of, any accident, wrong or other occurrence causing or inflicting injury or damage to any person or prop-
108 erty whomsoever or whatsoever, happening or done in, upon or about said premises, or due directly or indirectly to the tenancy, use or occupation of said premises, or any part thereof, by the Lessee, or any person or persons holding or claiming by, through, or under the Lessee.

SECTION 2. And the Lessee further covenants that no building or improvement will at any time be put, kept, or maintained on said premises in such condition or so occupied that the same will not be insurable or insured, or kept insured, by responsible insurance companies and/or associations, against loss or damage by fire, tornado, and windstorm, as hereinbefore in this Lease provided; nor will the Lessee, in respect of any building or improvement that may at any time be on said premises, commit or permit the violation of any provision or condition of any policy of insurance then effected, or placed, or in force thereon, nor will the Lessee do, cause, or suffer to be done, anything in, or upon, or about any such building or improvement that may void or tend to void any policy of insurance then effected, placed, or in force thereon.

SECTION 3. The Lessee further covenants that the Lessor and its agents shall at all reasonable times and during all reasonable hours have free access to said demised premises, and to and through any

building or structure, that may at any time be thereon, for the purpose of examining or inspecting the condition of the same, or exercising any right or power granted to the Lessor under any of the provisions of this Lease.

SECTION 4. The Lessee covenants and agrees that it has examined and knows all of the contents of the leases referred to in Parcels 2 and 3 of the demised premises, and the Lessee further covenants and agrees that it will not do or knowingly permit anything to be done which would subject said leases or either of them to forfeiture. The Lessee further covenants and agrees that it will do and perform all things required to be done by the lessee under said leases and will hold and save harmless the Lessor from any liability whatever accruing upon the Lessor hereunder by virtue of the terms, covenants, or provisions of said leases or either of them. In case there shall be any conflict between said leases or either of them and this Lease with reference to the use, occupation, insurance, construction, or rebuilding, then the provisions of the said leases re-
109 ferred to in Parcels 2 and 3 of the demised premises shall be controlling as to the parcel specified in such lease, provided, however, that nothing in this Section contained shall operate to lessen the liabilities of the Lessee under the terms and conditions of this Lease.

ARTICLE ELEVEN

NO REPRESENTATION AS TO PREMISES

And the Lessee further covenants and acknowledges that it has examined and knows the condition of said premises and the buildings thereon, and that no representations as to said premises or as to the condition or repair or occupation thereof were made by the Lessor or any agent or representative of the Lessor, prior to, or at, the execution of this Lease.

ARTICLE TWELVE

NOTICE OF EJECTMENT, ETC.

The Lessee does further covenant and agree that in case at any time any suit in ejectment or any other proceeding shall be begun by any person or persons, other than the Lessor, against the Lessee, or against said premises, to recover the possession thereof, or in anywise affecting the title thereto, then the Lessee will forthwith, upon notice or knowledge of said suit, give written notice thereof to the Lessor.

ARTICLE THIRTEEN

COVENANT OF QUIET ENJOYMENT

The Lessee on paying the rent and all other amounts herein reserved and keeping and performing all and singular the covenants

and agreements of this Lease on the part of the Lessee to be kept, observed, and performed, shall have the peac'able and quiet enjoyment of the demised premises and the buildings and improvements thereon, without let, hindrance, or disturbance on the part of any person claiming through or under the Lessor during the term herein demised.

Article Fourteen

Lessor's costs of litigation, etc.

In case the Lessor, without any fault on its part, be made a party to any litigation commenced by or against the Lessee, then the Lessee shall and will pay all costs, reasonable attorney's fees and expenses incurred by or imposed on the Lessor by or in connection with such litigation. The Lessee will also pay all costs, reasonable attorneys' fees and expenses which may be incurred or paid by the Lessor in enforcing the covenants and agreements of this Lease, and all such costs and attorneys' fees, if paid by the Lessor upon the failure of the Lessee so to do, shall be so much additional rent due on the next rent date after such payment or payments, together with interest at Eight Per Cent. (8%) per annum from the date of payment, and shall be collected as any other rent specifically reserved herein.

Article Fifteen

Lessor's liability as to title limited

It is further covenanted and agreed that in no case shall the Lessor be liable under any expressed or implied covenants of title to the demised premises or any estate or interest therein for any damage whatsoever to the Lessee, provided, however, that nothing in this section contained shall relieve the Lessor from its obligation to convey the Lessor's interest in the demised premises according to the terms and conditions in Article Four hereof provided.

It is understood and agreed by and between the parties hereto that during such time as The Huntington National Bank of Columbus, as Trustee under the Declaration, or its successor or successors in trust, shall be Lessor under this Lease, nothing herein contained shall create nor be construed as creating any personal liability, obligation, or undertaking on the part of such Trustee, or any Beneficiary of said trust, personally to perform any covenant, either express or implied, herein contained, all such liability, if any, being expressly waived by the Lessee and by every person now or hereafter claiming any right under this Lease.

Article Sixteen

Delays and strike clause

It is further covenanted and agreed that actual delays due to fire, floods, strikes, lockouts, or work done required by any lawful author-

ity, or changes in plans made with the consent of the parties hereto, or delays from acts of God or inevitable casualty beyond the
111 control and without the fault of the Lessee or delays due to failure of Lessor to approve plans, or on account of arbitration, shall not be reckoned in the period or periods of time herein specified within which, under the terms of this Lease, the Lessee is required to construct or reconstruct a new building and improvements or to repair or rebuild any building and improvements at any time standing or located upon said demised premises, but the number of days that the completion of said repair, rebuilding or construction shall be delayed by any or all of said causes shall be added to said period or periods of time and the date of completion of said repair, rebuilding or construction thereby, and to that extent, extended.

Article Seventeen

Building part of realty—alterations or additions by lessee

The Lessee further covenants and agrees not to dismantle, demolish, or remove any building, or any other improvement now or at any time hereafter situate, or standing, upon the said lands, excepting as in this Lease expressly allowed and solely for the purpose and under the conditions herein provided, but every building and improvement, at any time hereafter erected, put or placed upon the said premises, as well as all additions thereto, shall so soon as erected, constructed, or made, become and constitute a part of the realty; and the Lessee further covenants and agrees that upon the expiration, or the termination, of the term of this Lease in any way, whether by lapse of time, forfeiture, or otherwise, all buildings, improvements and fixtures then upon the said lands or appurtenant thereto, including too, all engines, machinery, dynamos, and generators upon the said lands, attached thereto, or used in, or in connection with, the care, operation, or maintenance of any such building or improvement, and also all boilers, furnaces, elevators, fire escapes, and all lifting, heating, cooling, refrigerating, ventilating, closing, lighting, gas and plumbing apparatus, appliances, and fixtures, shall belong to the owner or owners at that time of the reversion in said demised premises, without further act or conveyance, and no compensation therefor shall be due or payable, or allowed or paid, to the Lessee, or to any other person.

It is expressly understood that the full and absolute prop-
112 erty and title in and to the buildings and improvements, together with their appurtenances and fixtures, now or at any time on said premises (but not including movable trade fixures), until removed pursuant to the provisions of Section 1 of Article Nine of this Lease and in the mode and at the time therein required, or unless the Lessee shall purchase the demised premises, as permitted in Article Four of this Lease, shall remain in the Lessor, and shall

not be held or taken to have passed or to have been transferred to the Lessee by virtue of any of the provisions of this Lease; provided that whenever the Lessee shall proceed to remove the buildings now upon the said premises, conformably to the provisions of said Article Nine, then (but not otherwise) all the material and salvage of and from any such building may be appropriated by the Lessee, without the payment of any compensation therefor.

ARTICLE EIGHTEEN

REENTRY AND FORCIBLE DETAINER

SECTION 1. The Lessee further covenants and agrees that in case at any time or times—

(1) Default shall be made in the payment of any stipulated rent herein reserved or any other amount payable under the provisions of Article Two hereof, or any part thereof, upon the day the same became due and payable, or in the payment of any other moneys that may become or fall due or payable under this Lease; or

(2) Default shall be made by the Lessee in the due and full observance or performance of any other covenant, provision, or condition herein provided to be kept, performed, or observed by the Lessee and such default shall continue for a period of thirty (30) days after written notice thereof shall have been given to the Lessee by the Lessor;

then the Lessor may serve upon the Lessee notice of the Lessor's election to declare the term of this Lease ended, and to terminate this Lease, and in case any such default shall not be cured within thirty (30) days after the service of such notice, then in every such case of continuing default it shall and will be lawful for the Lessor, at its election, at any time thereafter, and without any demand or further notice, to declare said term ended and into and upon the said premises and the buildings and improvements then situate
113 thereon, or any part thereof either with or without process of law, forcibly or otherwise, to reenter and the Lessee, or any other person or persons or property occupying, in or upon the same, to expel, remove or put out, using all force and means that may be necessary for so doing, and the said premises, together with the buildings and improvements then thereon, again to repossess and enjoy as of the Lessor's first and former estate, free of any right or claim on the part of the Lessee, all of which the Lessee expressly authorizes and empowers the Lessor in each and every case to do.

And the Lessee does expressly covenant and agree that upon the termination of the said term in any way, whether by lapse of time, or at the election of the Lessor, as aforesaid, or in any other way, the Lessee will immediately upon such termination, yield and surrender said premises, together with the buildings, improvements, and fixtures then thereon, and their appurtenances, peaceably to the

Lessor and deliver possession thereof to the Lessor; and if the Lessee, or any other person, shall remain in possession of said demised premises or any building or improvement thereon, or any part thereof, after the termination of said term in any way, it, he or they, as well as any property or goods then upon said premises, may be expelled, removed, or put out, with the use of such force or means as may be necessary, and the Lessor may enter into and possess, repossess, and enjoy said demised premises, together with the buildings and improvements then thereon, as in its first and former estate; and in case of the failure of the Lessee, or any other person, thus to yield, surrender and deliver up possession, as aforesaid, it, he and they and each and any of them, shall without further notice or demand, be deemed guilty of a forcible detainer of said premises under the statutes in such case made and provided, and otherwise, and shall be subject to eviction and removal, forcibly or otherwise, with or without process of law.

SECTION 2. And in order at any time or times to terminate said term or declare the same ended, as aforesaid, or to terminate the interest of the Lessee, and all persons claiming by, through or under the Lessee, therein, or in said premises or any building or improvement that may at any time be thereon, because of any default or breach, as aforesaid, or in order at any time or times to
114 authorize a reentry, as aforesaid, or permit the taking of possession, as aforesaid no demand for rent or for the payment of any other moneys that may become or fall due under this Lease, no demand for the performance or observance of any other covenant or provision of this Lease, no demand for possession or the surrender or delivery of said premises, or any building or improvement thereon, and no notice of any intention or election to declare this Lease at an end or to terminate said term, or to enforce said forfeiture or the termination of said term or interest, shall be necessary or in any way required (saving and excepting always the written notice provided for in Section 1 of this Article, and the duplicate copy of such notice provided for in Section 3 of Article Twenty-seven); and the Lessee, for itself, and its successors and assigns, does hereby expressly waive any right that it, or they, or any of them or anyone who may claim by, through, or under the Lessee, might otherwise have to any such demand, notice, or declaration, and does further expressly waive any right that the Lessee, or anyone who may claim by, through, or under the Lessee, might otherwise have to any notice to be given previous or precedent to the pursuit or enforcement of any right or remedy granted by this Article, further or other than the written notice of default in the payment of moneys, or in the due observance or performance of any covenant, provision or condition of this Lease, provided for in Section 1 of this Article, and the duplicate copy of such notices provided for in Section 3 of Article Twenty-seven.

SECTION 3. The Lessee further covenants and agrees that in case the Lessee shall fail to pay any installment of rent on the day when

he same becomes due and payable, or shall fail to pay any other um of money required to be paid hereunder on the day when the ame becomes due and payable according to the terms hereof, and ny such default shall continue for a period of thirty (30) days, the essor may, at its option, upon ten (10) days' written notice to the essee, and to any mortgagee or trustee who shall have complied ith the provisions of Section 3 of Article Twenty-seven hereof which notice may be given concurrently with said thirty (30) day eriod), collect the income from the demised premises directly from ny occupying tenants and may apply the amount so collected to the payment of the amounts due and payable by the Lessee under the terms of this Lease, and in any such case the Lessee covenants and agrees to give Lessor such assistance as may be ecessary or desirable to effectuate the collection of the rents of the emised premises. The remedies herein given upon such default hall be in addition to and cumulative to any and all other rights nd remedies given to the Lessor by law, or by virtue hereof, on account of any such default.

Article Nineteen

Lien of rent, etc.

And in addition to the other rights, remedies, and security hereinder or otherwise conferred, the Lessor shall also have and is hereby xpressly given and granted a valid, first, superior, and paramount ien upon the leasehold estate of the Lessee in said premises and pon any and all buildings and improvements, as well as all aparatus, appliances, and fixtures therein contained or thereto belonging or appurtenant, that may now, or at any time hereafter, stand r be upon said premises (but not including movable trade fixtures) nd upon all the rents, issues, profits, and income accruing or to ccrue therefrom, and upon the Lessee's interest in any sublease or ubleases that may be entered into by the Lessee for all or any part f the demised premises, all whereof are hereby specifically pledged o the Lessor as security for the payment of any rent, or other moneys, ums, or amounts that may from time to time be or become due to he Lessor under the provisions of this Lease.

Article Twenty

Receipt of rent after notice

Section 1. The Lessee further covenants and agrees that after he service of any notice, or the commencement of any suit or action or possession, or after final judgment in any such suit or action, he Lessor may receive and collect any rent due hereunder, and the ceptance or collection thereof shall not waive or affect said notice, id suit, said action, or said judgment.

SECTION 2. The Lessee further covenants and agrees that the re-entry of the Lessor, and the repossession by it, as hereinbefore
116 stipulated, of said premises on account of any default or breach by the Lessee, or anyone claiming or holding under the Lessee, in the payment of rent as herein agreed, or in the performance or observance of any of the other covenants hereof, shall not work a forfeiture of any sum agreed to be paid as rent or other payment by the Lessee, but the Lessee shall continue to be and remain liable for the same, less any net rentals received by the Lessor after deducting from the gross rentals all of Lessor's expenses in connection with reletting, including all agents' commissions, costs of securing tenants, and cost of operation of the property.

ARTICLE TWENTY-ONE

MANNER OF SERVING NOTICE, ETC.

SECTION 1. The Lessee does further covenant and agree, as a condition of this Lease, that in every case where under any of the provisions of this Lease, or in the opinion of the Lessor, or otherwise, it shall or may be or become necessary, or the Lessor shall desire, to make, give or serve any declaration, demand, or notice of any kind or character, or for any purpose whatsoever, it shall be sufficient:

Either (1) To deliver, or cause to be delivered, a copy of any such declaration, demand, or notice to the Lessee for the time being, or to some officer of the Lessee, if the Lessee be a corporation.

Or (2) To send, or cause to be sent, a copy of any such declaration, demand, or notice, by registered mail, postage prepaid, properly addressed to the Lessee for the time being at such address as the Lessee may have theretofore furnished the Lessor in writing for the declared and express purpose of receiving notices; or if no such address shall have been theretofore furnished to the Lessor for such purposes, then properly addressed to the Lessee at the Lessee's last known address.

All notices to, or demand upon, the Lessee shall be, and are hereby required to be, in writing; and in any case the declaration, demand or notice, or copy thereof, may be signed, and made, given or served or directed, or caused to be made, given, or served by the Lessor in person or by or through its agent, attorney, or servant.

117 And in each and every case such service, in any of the modes above provided, of any declaration, demand, or notice, shall be sufficient and held effectual for all purposes, and no other or further declaration, demand, or notice or method of giving, serving, or delivering the same shall be required.

And if at any time there shall be more than one Lessee, or more than one party upon whom any demand is desired or necessary to be made, or upon or to whom any notice is desired or necessary to be given or served, then and in every such case service upon any one of them in the manner aforesaid shall be deemed, held, and con-

sidered effectual and sufficient service upon all, saving and excepting always the duplicate notices provided for in Section 3 of Article Twenty-seven.

SECTION 2. Whenever under any of the provisions of this Lease, or for any reason, any notice to, demand upon, or delivery or tender to the Lessor for the time being, may be necessary or appropriate, such notice, demand, delivery, or tender shall be and is hereby required to be in writing; which writing either shall be delivered to the Lessor for the time being in person, or to some officer of the Lessor if the Lessor be a corporation, at such place in the City of Columbus as the Lessor may have last previously designated in writing for the express purpose of receiving notices, or in default of such designation, then at such place in the City of Columbus as the Lessor may have last previously designated in writing, as the place for the payment of rent, pursuant to the provisions of Article Two of this Lease, or in default of any such designation, then at such place in the City of Columbus aforesaid (other than said demised premises) at which the last preceding quarterly rent may have been paid; and in addition to leaving said writing at one of said places so mentioned, a duplicate thereof shall be sent by the Lessee to the Lessor by registered mail (postage prepaid) properly addressed to the Lessor for the time being at such address as the Lessor may have last previously designated in writing for the express purpose of receiving notices, or in default of such designation, then at such place in the City of Columbus as the Lessor may have last previously designated in writing as the place for the payment of rent as aforesaid, or in default of any such designation, then at the Lessor's last known address.

118

ARTICLE TWENTY-TWO

INTEREST

The Lessee further covenants and agrees that every installment of rent and any and all other sums becoming or falling due or payable to the Lessor under this Lease, including all moneys or sums advanced or expended by the Lessor under the authority of, or pursuant to, any of the terms or provisions of this Lease, or because, or on account, of any default or breach of the Lessee in the performance or observance of any of the covenants or conditions of this Lease, to be kept, observed, or performed by the Lessee, shall bear interest from the respective time or times the same are due, or payable, until fully paid at the rate of Eight Per Cent (8%) per annum computed quarterly.

ARTICLE TWENTY-THREE

INDEMNITY OF LESSOR

The Lessee further covenants and agrees that the Lessee will indemnify the Lessor against and pay and discharge any loss, costs,

damages, or expenses (including all reasonable attorneys' and counsel fees) that may, at any time or times, result from or arise out of, or that it may be put to, sustain, or incur by reason of, any default or failure on the part of the Lessee to comply in any respect with, or to observe any requirement or provision of this Lease, or that Lessor may sustain, be put to, or incur in enforcing, or properly seeking to enforce, any of the terms, obligations, or covenants hereof; and further, that in case of any suit or proceeding to enforce or secure the performance or obesrvance, or to prevent the breach or violation, of any of the covenants or provisions of this Lease, or of any other suit or proceeding at law or in equity, wherein the Lessor shall be or become a party, because of any act, omission, or default of, or claim against, the Lessee or anyone claiming or to claim by, through, or under the Lessee, or any occupant of said premises, the reasonable costs and expenses of the Lessor, including attorneys' fees, in or about any and every such suit or proceeding or the institution or commencement thereof shall be forthwith repaid, refunded, and allowed by the Lessee to the Lessor, and may also be deemed and taken to be so much additional and further rent for the said demised premises, due immediately from and pay-
119 able by the Lessee, and shall be also a further charge and lien upon any property of the Lessee, as hereinbefore provided, and may also be included, and their payment provided for, in any decree or judgment rendered in the suit or proceeding by reason whereof or wherein the same shall have been incurred or paid, or may be otherwise recovered.

Article Twenty-four

Provision for receiver

In the event of the commencement of any action or other proceeding on the part of the Lessor to terminate the estate or interest of the Lessee (in case the Lessor should elect to proceed in that manner) or of any other action or proceeding on the part of the Lessor, wherein the appointment of a receiver may be appropriate, then the Lessor shall, as a matter of right and immediately upon the institution of any such action or proceeding, upon notice to the Lessee, be entitled to the appointment of a receiver, for its security and benefit, of said premises and property and all the buildings and improvements thereon, and of the rents, issues, profits, and other income thereof, with such ample powers as the court making such appointment can confer.

Article Twenty-five

Remedies cumulative—waiver not to be inferred

Section 1. No remedy herein or otherwise conferred upon, or reserved to, the Lessor, shall be considered exclusive of any other remedy, but the same shall be cumulative and shall be in addition

to every other remedy given hereunder, or now, or hereafter existing at law or in equity or by statute; and every power and remedy given by this indenture to the Lessor may be exercised from time to time and as often as occasion may arise or as may be deemed expedient. No delay or omission of the Lessor to exercise any right or power arising from any default shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein.

No waiver of any breach of the covenants or conditions of this Lease shall be construed, taken, or held to be a waiver of any other breach, or waiver of, acquiescence in, or consent to, any further or succeeding breach of the same covenant or condition.

120 SECTION 2. In case the Lessor shall have proceeded to enforce any right under this Lease, by entry, suit or otherwise, and such proceeding shall have been discontinued or abandoned because of a waiver, settlement, or for any other reason, or shall have been determined adversely to the Lessor, then and in every such case the Lessor shall be restored to its former position and rights hereunder in respect of said demised premises, and all rights, remedies, and powers of the Lessor shall continue as though no such proceedings had been taken.

SECTION 3. No acceptance by the Lessor at any time or times of any rent or other sum at any time due or owing under this Lease, or acceptance of, or assent to, the performance or observance of any covenant or condition of this Lease, shall be construed, taken, or held to be a waiver of any breach of any of the other covenants or conditions of this Lease, or an acquiescence in, or consent to, such breach.

SECTION 4. Neither the rights given herein to the Lessor, to receive, collect, or sue for any rent or rents, moneys, or payments, or to enforce any of the terms, provisions, and conditions of this Lease, or to prevent the breach or nonobservance thereof, nor the exercise of any such right, or for any other right or remedy of the Lessor hereunder, or otherwise granted, or arising, shall in any way affect or impair or toll the right or power of the Lessor to declare the term hereby granted, ended, and to terminate this Lease, as herein provided, because of any default in, or breach of, any of the covenants, provisions, or conditions of this Lease.

SECTION 5. No acceptance by the Lessor of legal tender currency, checks, bank notes, commodity, or anything whatever, other than gold coin of the United States of America, of the standard of weight and fineness hereinbefore specified in payment of any installment or installments of rent, or any other payment, shall be construed to be a waiver of the requirement to pay any other unpaid or subsequent installment in such gold coin, as hereinbefore provided, or affect or impair in any way the right of the Lessor to demand the payment of any other unpaid or subsequent installment or installments of rent in such gold coin, as herein specified.

121 ARTICLE TWENTY-SIX

FRONTAGE CONSENT

It is further covenanted and agreed that in all cases where any person or corporation may, directly or indirectly, attempt or seek to acquire, or be desirous of acquiring, through any public grant, the right to use or occupy any portion of any street or alley upon which said property abuts, and for that purpose the petition or consent of the owner of said property shall be necessary, demanded, or desired, this shall be understood to require the joint signature of the Lessor and the Lessee; it being hereby expressly agreed that during the continuance of said term neither the Lessor, nor the Lessee, shall alone sign or execute any consent, petition, or other instrument in writing required or desired for any such purpose, but in every such case the joint consent or petition of the Lessor and the Lessee shall be necessary to make any such consent, petition, or other like instrument, effectual.

ARTICLE TWENTY-SEVEN

ASSIGNMENT OR MORTGAGE OF LEASE AND SUBLEASE

SECTION 1. The Lessee also covenants and agrees that it will not assign this Lease or the Lessee's interest therein, and that neither this Lease nor the Lessee's interest therein will in any case or by any mode or means be assigned, unless: (1) at such time the Lessee shall not be in arrears of rent or other payments to be made hereunder, nor in default in the performance or observance of any of the covenants, conditions, or provisions of this Lease; (2) the assignee or purchaser at the time of the assignment shall properly execute, acknowledge, and deliver a valid, binding, and sufficient instrument in writing, directly enforcible by the Lessor, wherein such assignee or purchaser shall assume and agree to pay all the rents and other amounts herein reserved, and expressly assume and agree to perform, keep, observe, and be bound by all the covenants, provisions, and conditions of this Lease, including those of this Article; (3) such instrument, or a properly executed duplicate thereof, acknowledged in the same manner as this Lease, shall be filed for record in the office of the Recorder of Franklin County, Ohio, or other proper office
122 established for such purpose; (4) either the original or such duplicate (together with a written statement of the assignee's or purchaser's place of business) shall, within thirty (30) days after its execution, be delivered to the Lessor; (5) a building or buildings shall be standing upon the premises of a value and in conformity with the provisions of this Lease; all of which said provisos and conditions shall be conditions to any right on the part of the Lessee to assign this Lease. The conditions of this Article shall be continuing conditions and shall apply to every successive assignment under this Lease, and the noninsistence upon, or waiver of them, in any one

case, shall not be taken to be a waiver of the conditions in any other case, nor shall consent given in any one case be held to extend to any subsequent case, but the Lessee hereunder shall continue to be liable upon the covenants of this Lease, notwithstanding such assignment and no acceptance of rent from any assignee shall be construed to relieve the Lessee or any assignee from liability hereunder.

SECTION 2. It is, however, further expressly provided, anything hereinbefore contained appearing to the contrary notwithstanding, that the Lessee may at any time, or times, that it shall not be in arrears of rent, nor in default in the performance or observance of any of the covenants, provisions, or conditions of this Lease, mortgage (or convey by deed of trust in the nature of a mortgage), the Lessee's estate or interest acquired by, under, or through this Lease in the said premises and in any building or improvement then or thereafter situate thereon; provided, however, always (1) that such mortgage or deed of trust be made in good faith and represent a bona fide transaction, (2) that no mortgagee or trustee, or anyone to claim by, through, or under such mortgage or deed of trust in the nature of a mortgage, shall, by virtue of such mortgage or deed of trust, acquire any greater or more extended rights in the said premises and in any building or improvement then or thereafter situate thereon than the Lessee has under this Lease, and provided, further, that such mortgage or deed of trust, and the rights and interest of the mortgagee or trustee, and of all persons to claim by, through, or under such mortgage or deed of trust, shall at all times be in every respect subject, subservient, and subordinate to all the conditions, provisions, stipulations, requirements, covenants, and obligations of this Lease, and to the rights, powers, and privileges of the Lessor hereunder, as well as in respect of any building or improvement from time to time upon said premises, or otherwise, and provided further, that no person acquiring title to the leasehold estate or interest, or any part thereof, created by, under, or through this Lease, shall assign or transfer the same, otherwise than as under the conditions and mode in this Article expressly permitted to the Lessee. And the Lessee covenants and agrees that, excepting as aforesaid and under the conditions aforesaid, and excepting for the purpose aforesaid, he will not mortgage or encumber this Lease or the Lessee's estate or interest acquired hereunder.

123

SECTION 3. If, at any time after execution and record in the Recorder's office of Franklin County, Ohio, of any such mortgage or deed of trust, the mortgagee or trustee therein shall notify the Lessor, in writing that any such mortgage or deed of trust has been so given and executed by the Lessee, and shall at the same time either furnish the Lessor with the address to which he desires copies of notices to be mailed, or designate some person or corporation in the City of Columbus, Ohio, as his agent and representative for the purpose of receiving copies of notices, the Lessor hereby agrees that it will thereafter mail either to such mortgagee or trustee or

to the agent or representative so designated by said mortgagee or trustee, at the address so given, a duplicate copy of any and all notices in writing which the Lessor may from time to time give to or serve upon the Lessee, under and pursuant to the terms and provisions of this Lease.

SECTION 4. Such mortgagee or trustee may, at its option, at any time before the rights of the Lessee shall have been forfeited to the Lessor, as provided for in this Lease, pay any of the rents or other amounts due hereunder, or effect any insurance, or pay any taxes and assessments, or make any repairs and improvements, or make any deposits, or do any other act or thing required of the Lessee by the terms of this Lease, or do any act or thing which may be necessary and proper to be done in the observance of the covenants and conditions of this Lease, or to prevent the forfeiture of this Lease; and all payments so made, and all things so done
124 and performed, by any such mortgagee or trustee, shall be as effective to prevent a forfeiture of the rights of the Lessee hereunder as the same would have been if done and performed by the Lessee instead of by any such mortgagee or trustee. Any such mortgage or deed of trust so given by the Lessee may, if the Lessee so desires, be so conditioned as to provide that, as between any such mortgagee or trustee and the Lessee, said trustee or mortgagee, on making good and performing any such default or defaults on the part of the Lessee, shall be thereby subrogated to any or all the rights of the Lessee under the terms and provisions of this Lease.

No such mortgagee or trustee of the rights and interests of the Lessee hereunder shall be or become liable to the Lessor as an assignee of this Lease, until such time as said mortgagee or trustee shall by foreclosure or other appropriate proceedings in the nature thereof, or as the result of any other action or remedy provided for by such mortgage or deed of trust, or by proper conveyance from said Lessee, acquire the rights and interest of the Lessee under the terms of this Lease; but any person or persons, corporation or company, on acquiring the rights and interest of the Lessee under the terms and provisions of this Lease, either by judicial sale thereof, made under and pursuant to the terms and provisions of any such mortgage or deed of trust, or as the result of any other action or remedy provided for by such mortgage or deed of trust whether by judicial proceedings or not, or as the result of any legal process or proceedings whatsoever, shall thereby be and become liable to the Lessor for the performance of each and all the terms, provisions, and conditions of this Lease as fully and completely as is herein provided for an assignee of said Lease.

ARTICLE TWENTY-EIGHT

EXTENSION OF TERM OF LEASE

The Lessee shall have the right and option at the expiration of the term herein demised, if this Lease is then in force and there is no

existing default on the part of the Lessee to renew this Lease for an additional period of ninety-nine (99) years upon the same terms and conditions and at the rental and other amounts hereinbefore provided to be paid except that there shall be no option to pur-
125 chase the demised premises. In case the Lessee desires to exercise said option to renew this Lease for said additional period of ninety-nine (99) years, the Lessee shall serve upon the Lessor, not less than one year or more than two years prior to the expiration of the term hereby demised, written notice of its intention to exercise said option, and the Lessor and the Lessee shall thereupon enter into a written agreement extending this Lease for such additional period of ninety-nine (99) years upon the terms and conditions in this paragraph specified, which instrument shall be in form for record and shall be recorded in the office of the Recorder of Franklin County, Ohio, or other proper recording office.

Similarly upon the expiration of said extended term of ninety-nine (99) years and upon the expiration of each extended term thereafter, so long as this Lease or any extension or renewal thereof shall continue in force and the Lessee shall not be in default under any of the terms, covenants, and conditions thereof, the Lessee shall have the right from time to time forever to have this Lease extended for additional terms of ninety-nine (99) years upon and subject to the same rental terms and conditions of payment as are herein provided in respect of the first extension, upon the condition that in any case the Lessee shall give the Lessor written notice of its election to take such extension not less than one year nor more than two years prior to the expiration of the term thus ended.

Provided, however, that if by February 1, 2014, either or both of the leases specified in Parcels Two (2) and Three (3) of the demised premises shall then be subsisting, the Lessee hereunder shall notify the Lessor on or before February 1, 2014, as to whether or not it elects to renew this Lease for an additional ninety-nine (99) year term and if it shall elect to renew this Lease, then the Lessor as lessee under either or both of said leases will elect to renew such lease or both of them, and such election to renew so made shall operate to renew this Lease for an additional ninety-nine (99) year period. If the Lessee shall elect not to renew this lease or shall fail to make an election on or before said date, then the Lessor may at its option elect not to renew either or both of said leases, and in case the Lessor shall so elect not to renew said leases or either of them, then upon expiration of such lease or leases, this Lease shall expire as to the premises covered by such lease or leases so expiring, and there
126 shall on account of such expiration be no abatement in the option price or in any other amounts payable hereunder except that the annual rental payable hereunder shall be reduced by the amount of the annual rent payable under such lease or leases so expiring.

Similarly upon any extended or renewed term, the Lessee shall make an election on or before February 1 of the year in which either

or both of such leases then subsisting will terminate, with like effect as hereinabove set forth, with respect to the first term.

ARTICLE TWENTY-NINE

COVENANTS TO RUN WITH LAND, ETC.

The covenants in this Lease contained shall be covenants running with the land, and each of the expressions, phrases, terms, conditions, provisions, stipulations, admissions, promises, agreements, requirements, covenants, and obligations of this Lease shall wherever applicable extend to and bind, or inure to the benefit of (as the case may be), not only the parties hereto, but their respective successors and assigns, and whenever in this Lease reference is made to either of the parties hereto or to the Lessor or to the Lessee, it shall be held to include and apply to, wherever and whenever applicable, also the successors and assigns of such party, the same as if in each and every case so expressed.

In witness whereof, the parties hereto have caused these presents to be signed in duplicate this June 27th, 1928.

THE HUNTINGTON NATIONAL BANK OF COLUMBUS,
Trustee,

By B. S. WELLMAN, *Vice President.*

Attest:

[CORPORATE SEAL] E. R. NEAL, *Cashier.*

Signed and acknowledged in the presence of:

LOWRY SWENEY.

F. J. WRIGHT.

THE F. & R. LAZARUS & COMPANY,
By ROBERT LAZARUS, *Vice President.*

Attest:

[CORPORATE SEAL] FRED LAZARUS, JR., *Secretary.*

Signed and acknowledged in the presence of:

DELIA C. ANDREWS.

J. W. STEINHAUSER.

127. STATE OF OHIO,
Franklin County, ss.

Before me, a Notary Public in and for said County, personally appeared B. S. Wellman and E. R. Neal, to me known and known to me to be the Vice President and Cashier, respectively, of The Huntington National Bank of Columbus, Trustee, the corporation which executed the foregoing Lease, and severally acknowledged that they did sign and seal said instrument for and on behalf of said corporation, and that the same is their free act and deed as such officers respectively and the free and corporate act and deed of said The Huntington National Bank of Columbus, Trustee.

In testimony whereof, I have hereunto set my hand and official seal this 27th day of June 1928.

[NOTARIAL SEAL] F. J. WRIGHT,
Notary Public.

STATE OF OHIO,
Franklin County, ss.

Before me, a Notary Public in and for said County, personally appeared Robert Lazarus and Fred Lazarus, to me known and known to me to be the Vice President and Secretary, respectively, of The F. & R. Lazarus & Company, the corporation which executed the foregoing Lease, and severally acknowledged that they did sign and seal said instrument for and on behalf of said corporation, and that the same is their free act and deed as such officers respectively and the free and corporate act and deed of said The F. & R. Lazarus & Company.

In testimony whereof, I have hereunto set my hand and official seal this 27th day of June, 1928.

[NOTARIAL SEAL] J. W. STEINHAUSER,
Notary Public.

128 *Petitioner's exhibit No. 7*

Agreement and declaration of trust between The Huntington National Bank of Columbus, as Trustee and The Holders of Land Trust Certificates of Equitable Ownership in The Lazarus Store Building Site Located in Columbus, Ohio, Dated June 1, 1928

Filed in the office of the Recorder of Franklin County, Ohio on June 28, 1928, as Document No. 8865.

Agreement and declaration of trust, dated for convenience June 1, 1928, but actually executed June 27th, 1928 (hereinafter sometimes called the "Declaration"), between The Huntington National Bank of Columbus (of Columbus, Ohio), a national banking association organized and doing business under the laws of the United States of America and duly empowered and authorized to do a trust business under the laws of the United States of America and the State of Ohio, with its principal place of business in Columbus, Ohio, as Trustee (hereinafter called "Trustee"), party of the first part, and such persons, partnerships, associations and/or corporations, as may hereafter become parties hereto by the acceptance of Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called "Beneficiaries"), parties of the second part,

129 WITNESSETH: That the said Trustee and the holders of Certificates issued and to be issued hereunder do hereby, in consideration of their mutual covenants, make the following agreement and declaration of trust with respect to the property hereinafter described.

ARTICLE I

The Trustee hereby agrees that it will hold as Trustee upon the trust hereinafter set forth, for the use and benefit of all present and future holders of the Certificates of Equitable Ownership issued hereunder (hereinafter sometimes called "Land Trust Certificates"), the title acquired by the Trustee by a certain deed and assignments dated as of June 1, 1928, but in fact executed and delivered simultaneously herewith, from The F. & R. Lazarus & Company, and filed for record in the office of the Recorder of Franklin County, Ohio, on the 28th day of June 1928, as Document Nos. 8864 and 1833, to the following described premises, and property:

PARCEL I

Situated in the City of Columbus, County of Franklin, and State of Ohio, and being all of Inlot Number Two Hundred Fifty-eight (258) in said City of Columbus, as the same is numbered and delineated upon the recorded plat thereof, of record in Deed Book "F," page 332, Recorder's Office, Franklin County, Ohio; also,

All of Lots Numbers One (1), Two (2), Four (4), Five (5) of a subdivision of Inlots Two Hundred Fifty-nine (259) and Two Hundred Sixty (260) in said City of Columbus, Ohio, made by Lincoln Goodale's Executors, as the same are numbered and delineated on the recorded plat thereof, of record in Plat Book Number 2, page 52, Recorder's Office, Franklin County, Ohio, excepting from said Lot No. 2 the northerly 45/100 feet in width thereof; also that part of said Lot Number Three (3) of said subdivision bounded and described as follows:

Commencing *on* the northwest corner of said Lot Number Four (4); thence with the north line of said Lot Number Three (3) westwardly twelve (12) feet; thence at right angles southerly sixteen (16) feet and eleven (11) inches; thence eastwardly twelve (12) feet to the southwest corner of said Lot Number Four (4); thence northwardly to the place of beginning; also

All of Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), and Nine (9), and including all vacated alleys, in the Subdivision of Inlots Numbers Two Hundred Three (203), Two Hundred Four (204), and Two Hundred Five (205) in the City of Columbus, Ohio, made by the Executors of L. Goodale, as the same are numbered and delineated upon the recorded plat of said Subdivision, of record in Plat Book Number 2, page 15, Recorder's Office, Franklin County, Ohio; also

All that part of the buildings situated on the foregoing premises, and that which now extends above and over Wall Street in said City, and joins the building fronting on High Street with the building fronting on Front Street in said City, together with all of the rights in respect thereto as more fully set out in Ordinance No. 36350 passed by the Council of the City of Columbus.

The Trustee also holds upon the trusts herein set forth, the following leasehold estates:

PARCEL II

That certain Indenture of Lease and the leasehold estate created hereby, dated December 11, 1915, from Henry Barcus et al. to Fred Lazarus and filed for record in Lease Record 27, page 536, Recorder's Office, Franklin County, Ohio, said lease covering premises bounded and described as follows: Situated in the City of Columbus in the County of Franklin, and in the State of Ohio, and being Lot Number Three (3) of a Subdivision of Inlots Numbers Two Hundred Fifty-nine (259) and Two Hundred Sixty (260) in the City of Columbus, made by the Executors of Lincoln Goodale, deceased, and of record in Plat Book Number 2, page 52, Recorder's Office, Franklin County, Ohio; excepting, however, the following described part thereof; beginning at the northwest corner of Lot Number Four (4) of said subdivision; thence with the north line of said Lot Number Three (3), westwardly twelve (12) feet; thence southerly at right 31 angles sixteen (16) feet, eleven (11) inches; thence eastwardly twelve (12) feet to the southwest corner of said Lot Number Four (4); thence northwardly sixteen (16) feet, eleven (11) inches to the place of beginning; also,

A part of Lot Number Two (2) of a Subdivision of Inlots Numbers Two Hundred Fifty-nine (259) and Two Hundred Sixty (260) in the City of Columbus, made by the executors of Lincoln Goodale, deceased, and of record in Plat Book Number 2, page 52, Recorder's Office, Franklin County, Ohio; "Being a strip of ground for a distance of sixty-two and one-half (62½) feet running west from High Street and being forty-five one-hundredths (45/100) feet wide off of the north side of Lot Number Two (2) of Goodale's Executors Subdivision of Inlots Numbers Two Hundred Fifty-nine (259) and Two Hundred Sixty (260), bounded and described as follows:

Beginning at a point in the east line of said Lot Number Two (2) Forty-five Hundredths (45/100) feet south of the northeast corner thereof (said beginning point being the south line of the brick work of a brick wall standing at this date at this point and being Eighty-eight and Five Hundredths (88.05) feet south from the true south line of Chapel Street, said true south line being One and Eighty-five Hundredths (1.85) feet south of the north edge of the foundation of the brick building now located at the southwest corner of High and Chapel Streets); thence westerly and parallel with the north line of said lot a distance of Sixty-two and One-half (62½) feet to a point (which point is located Fifty-five Hundredths (.55/100) feet north of the south line of the brick work of a brick wall standing at this date at this point, a witness to said last mentioned point being an iron pin located Ten (10) feet west of the west line and Three (3) feet south of the south line of said strip of land); thence northerly and parallel to the east line of said lot

Forty-five Hundredths (45/100) feet to a point at the northwest corner of said lot; thence easterly along the north line of said lot a distance of Sixty-two and One-half (62½) feet to the northeast corner of said lot; thence southerly along the east line of
132 said lot Forty-five Hundredths (45/100) feet to the place of beginning. The said fixed two points at the ends of the south line of the premises hereby described to be paramount over all things in determining and location of the premises hereby described.

PARCEL III

That certain Indenture of Lease and the Leasehold Estate created thereby, dated June 8, 1915, from Katherine E. Hutchinson, et al. to The Whitsit Realty Company, recorded in Volume 27 of Leases, page 119, Franklin County, Ohio, Records, said lease covering premises bounded and described as follows:

Situated in the County of Franklin, in the State of Ohio and in the City of Columbus, and being Lot Number Six (6) of a Subdivision of Inlots Numbers Two Hundred Fifty-eight (258), Two Hundred Fifty-nine (259) and Two Hundred Sixty (260), in the City of Columbus, as made by the Executors of Lincoln Goodale, deceased, as the same is numbered and delineated upon the recorded plat thereof, of record in Plat Book Number 2 page 52, Recorder's Office, Franklin County, Ohio.

All the above real estate described in parcels One (1), Two (2), and Three (3) being premises generally described as follows:

Beginning at the Northwest corner of the intersection of Town Street and High Street in the City of Columbus and extending in a Northerly direction One Hundred Eighty-eight feet (188') Two and One-eighth inches (2⅛") along the westerly side of said High Street to the Southwest corner of the intersection of said High Street and Chapel Street; thence Westerly along the Southerly side of said Chapel Street Four Hundred Eight feet (408') Ten and thirteen-sixteenths inches (10 13/16") to the Southeast corner of the intersection of said Chapel Street and Front Street; thence in a Southerly direction One Hundred Eighty-eight feet (188') and One-half inch (½") along the Easterly side of said Front Street to the
133 Northwest corner of the intersection of said Front Street and said Town Street; thence in an Easterly direction Four Hundred Eight feet (408') Eleven and One-half inches (11½") along the Northerly side of said Town Street, to the place of beginning; excepting therefrom a duly dedicated Public Way Thirty-three feet (33') in width and One Hundred Eighty-eight feet (188') Two and One-half inches (2½") in length, known as Wall Street and running in a Northerly and Southerly direction from said Chapel Street to said Town Street, bisecting into approximately equal parts this parcel of land herein generally described.

Said premises and leaseholds together with such interest which the Trustee may hereafter acquire in Parcels 2 and 3 by exercise of the

options granted in the leases therein referred to, are hereinafter sometimes referred to as the "Trust Estate." The Trust Estate is subject to a certain Indenture of Lease by and between the Trustee, as Lessor, as party of the first part, and The F. & R. Lazarus & Company, as Lessee (hereinafter sometimes referred to as the Lessee), as party of the second part, dated as of June 1, 1928, and filed for record in the office of the Recorder of Franklin County, Ohio, on the 28th day of June 1928, as Document No. 1834, to which Lease and the record thereof reference is hereby made for all terms and conditions thereof.

Said Lease provides, among other things, as follows (reference being made to said Lease, however, for a more explicit statement thereof):

(a) The term of said Lease is from June 1, 1928 to May 31, 2027, renewable, at the option of the Lessee, for additional terms of ninety-nine (99) years in perpetuity.

(b) The Lessee agrees to pay to the Lessor annually during each of the years of the term of the Lease, in addition to the rentals payable under the leases referred to in Parcels 2 and 3 above, a net annual rental of One Hundred Seventy-Five Thousand Dollars ($175,000), in equal quarterly installments payable in advance on the first business day of March, June, September, and December in each year, beginning June 1, 1928, and also covenants to pay
134 all taxes, assessments, levies, and public charges of every kind and character which are or may be levied and assessed upon the leased premises or any improvements thereon, and also certain charges, income taxes, costs and expenses of the Trustee under this Declaration, and certain other amounts, all as provided for in the Lease.

(c) The Lessee agrees to create a Depreciation Fund in the hands of the Lessor, by making payments in equal quarterly instalments of varying annual amounts of not less than Sixteen Thousand Two Hundred Fifty Dollars ($16,250), on the first business day of March, June, September, and December in each year, until such payments, with accumulations thereon, aggregate the sum of Two Million Six Hundred Thousand Dollars ($2,600,000), and the Lease provides the terms and conditions under which said fund is constituted a Depreciation Fund.

ARTICLE II

The equitable ownership and beneficial interest in the Trust Estate is divided into thirty-five hundred (3,500) indivisible equal shares, which shares shall be represented by Certificates of Equitable Ownership, said Certificates being referred to and designated as "Land Trust Certificates," varying only as to the respective numbers, names of the respective Beneficiaries, and the number of shares represented by the Certificates, and being in substantially the following form, to wit:

Number _____ Interest _____/3500ths

Land Trust Certificate of Equitable Ownership in the Lazarus Store Building Site Located in Columbus, Ohio

This certifies that _____ is registered on the books of the Trustee hereinafter named as the owner of _____ thirty-five hundredths (____/3500ths) of the equitable ownership and beneficial interest in certain property fronting approximately 187.5 feet on the west side of High Street, 375 feet on the north side of Town Street, and 187.5 feet on the east side of Front Street, Columbus, Ohio, comprising in all 70,312 square feet of land of
135 which 12,000 square feet are held through two perpetual leases with options to purchase, the title to which land and leaseholds is held by The Huntington National Bank of Columbus, as Trustee for the benefit of the holder or holders of this Certificate and of similar Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust. All of said Certificates are issued or are to be issued under and in pursuance of an Agreement and Declaration of Trust, in which said property is specifically described, dated June 1, 1928, between the Trustee as party of the first part, and such persons, partnerships, associations or corporations as may become parties thereto by the acceptance of Certificates of Equitable Ownership of like tenor herewith, in the trust thereby created, which Agreement and Declaration of Trust (hereinafter sometimes referred to as the Declaration) is of record in the office of the Recorder of Franklin County, Ohio, to which Declaration reference is hereby made for a statement of the rights and title of the holders of this Certificate and of all other Certificates issued under the Declaration, in said property, and of the terms and conditions of said trust.

The Trustee agrees that on the first business day of March, June, September, and December in each year, commencing September 1, 1928, it will pay to the registered holder of this Certificate, as registered on the Trustee's transfer books as of the 20th day of the month preceding the month of each such distribution, said holder's pro rata share of the net proceeds which may be derived by it from the rental of the property described in the Declaration and constituting the Trust Estate for the preceding quarter year, and that upon the termination of the trust it will account to the registered holder hereof for such holder's proportionate share of the Trust Estate or the net proceeds thereof, all in the manner provided in the Declaration.

Whenever in the Declaration or in this Certificate the Trustee is obligated to pay or distribute any sum of money, it is understood that all such obligations are undertaken by it in its trust capacity under the Declaration only and not personally and that such pay-

ments and distributions are to be made only out of such funds as the Trustee has in its hands available therefor.

The real estate hereinbefore and in Article I of the Declaration described, is leased to The F. & R. Lazarus & Company, for the term beginning June 1, 1928, and ending May 31, 2027, with privilege of renewals, under a Lease by which the Lessee agrees to pay annually during each of the years of the term of the Lease in addition to the rentals payable under the leases above referred to, a net annual rental of One Hundred Seventy-five Thousand Dollars ($175,000) in equal quarterly instalments payable in advance on the first business day of March, June, September, and December in each year.

Said Lease grants to the Lessee the option to purchase the entire leased premises at any time on and after June 1, 1933, up to and including May 31, 1938, at Three Million Six Hundred Five Thousand Dollars ($3,605,000); thereafter and up to and including May 31, 1948, at Three Million Five Hundred Seventy Thousand Dollars ($3,570,000); and thereafter during the continuance of the Lease at Three Million Five Hundred Thirty-five Thousand Dollars ($3,535,000); in each case plus accrued rental to date of purchase, less amounts in the Depreciation Fund, all as more fully provided in said Declaration.

Said Lease also provides for the creation of a Depreciation Fund by the Lessee in the hands of the Lessor, payable in equal quarterly instalments of varying annual amounts of not less than Sixteen Thousand Two Hundred Fifty Dollars ($16,250) annually, until said payments with accumulations thereon aggregate Two Million Six Hundred Thousand Dollars ($2,600,000), and provides the terms and conditions under which said Depreciation Fund is constituted.

The equitable interests represented by this Certificate are subject to call purchase by the Trustee, at the election of the Lessee, for the Depreciation Fund, at the following prices for each 1/3500th equitable interest: Ten Hundred Thirty Dollars ($1030) at any time on and after June 1, 1933, and up to and including May 31, 1938; Ten Hundred Twenty Dollars ($1020) thereafter and up to and including May 31, 1948; and thereafter at Ten Hundred Ten Dollars ($1010); in each case plus accrued rental to the date of such purchase at the rate of Fifty Dollars ($50.00) per annum for each 1/3500th share, in the manner and with the effect and upon the terms more particularly set forth in the Declaration.

137 The holder of this Certificate, by the acceptance hereof, expressly assents to all the terms and conditions of the Declaration and becomes a party thereto as fully to all intents and purposes as if said holder had signed the Declaration.

Subject to the terms and conditions of the Declaration, but not otherwise, this Certificate and the interest represented hereby may be conveyed and transferred in full shares of one thirty-five hundredths (1/3500ths) of the equitable interest in the Trust Estate, but not in

fractions thereof, by the holder hereof in person, or by duly authorized attorney, but only upon surrender of this Certificate, duly executed for transfer, for notation of such transfer upon the books of the Trustee, and the transferee shall, by accepting this Certificate or any Certificate which may be issued in place hereof, become a party to the Declaration and be bound thereby and entitled to all rights thereunder.

In witness whereof, The Huntington National Bank of Columbus, as Trustee, has caused these presents to be signed in its corporate name, by its President or Vice President, and its corporate seal to be hereto affixed, attested by its Cashier or Assistant Cashier, this ____ day of _____.

THE HUNTINGTON NATIONAL BANK OF COLUMBUS,
Trustee.

By _____, *Vice President.*

Attest:

_____,
Assistant Cashier.

(Form of Conveyance)

The undersigned, being the owner of the within Certificate issued under the provisions of an Agreement and Declaration of Trust, dated as of June 1, 1928, and filed for record in the office of the Recorder of Franklin County, Ohio, and being the owner of the entire beneficial interest represented by said Certificate in the
138 premises described in said Agreement and Declaration of Trust, for a valuable consideration does hereby sell, assign, transfer and convey to {_____ heirs and assigns, / _____ successors and assigns,} according to the terms of said Agreement and Declaration of Trust, _____/3500ths of the beneficial interest in said premises, and does hereby authorize said Trustee to make or cause to be made transfer of the same on its books.

_____

Dated _____, 19____

Signed and acknowledged in the presence of:

_____

_____

(Form of Acknowledgment Where Grantor is an Individual and Executes the Conveyance in Person)

STATE OF _____,
County of _____, *ss.*

This day personally appeared before me the above-named grantor, who acknowledged that _____ did sign the foregoing instrument, and that the same is _____ free act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at ------, this ---- day of ------, 19-----.

(Form of Acknowledgment Where Grantor is a Corporation)

STATE OF ----------,
County of ----------, *ss.*

This day personally appeared before me ------ and ------, known to me to be respectively the ------ and ------ of ------, who executed the foregoing instrument on behalf of said corporation,
139 and acknowledged the same to be the free corporate act and deed of said corporation and the free act and deed of themselves as such officers.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at ----------, this ------ day of ----------, 19-----.

(Form of Acknowledgment Where Grantor is an Executor, Administrator, Guardian, Trustee, or Acting in Other Representative Capacity)

STATE OF ----------,
County of ----------, *ss.*

This day personally appeared before me ----------, the above named ----------, who acknowledged that he did sign the foregoing instrument, and that the same is his free act and deed as such ----------.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at ----------, this ------ day of ----------, 19-----.

Note: The execution of the above conveyance must be acknowledged before a Notary Public or other officer authorized by the laws of the State of Ohio to take acknowledgments of deeds whose authority, if outside of the State of Ohio, shall be evidenced by the certificate of the Clerk of the proper court of record. If in a foreign country, the acknowledgment may be made before a Consul General, Consul, or other consular official of the United States. In all cases the officer taking the acknowledgment must add his official designation, residence, and seal, if he has one. When the conveyance is executed by an executor, administrator, guardian, trustee, or a person acting in any other representative capacity, proof of his authority to act must be furnished and must accompany the certificate.

140 In case any Certificate issued hereunder shall become mutilated or be destroyed, stolen, or lost, the Trustee may thereafter in its discretion issue in lieu thereof a new Certificate representing the interest represented by such mutilated, destroyed, stolen, or lost Certificate, in exchange and substitution for the Certificate mutilated, upon cancellation thereof, or in lieu of and in exchange and substitution for the Certificate destroyed, stolen, or lost, upon the registered holder filing with the Trustee evidence satisfactory to the Trustee that such Certificate was destroyed, stolen, or lost, and of such holder's ownership thereof, and furnishing the Trustee indemnity in form and with surety or security satisfactory to it, and for the benefit of all interested parties.

Article III

Section 1. Forthwith upon the execution and delivery of this Declaration, the Trustee shall issue, in its own name, a Land Trust Certificate or Certificates representing 250/3500ths of the equitable ownership and beneficial interest in the Trust Estate, which Certificates so issued are herein sometimes called "Reserved Certificates," and the Trustee shall hold the Reserved Certificates and the equitable interests evidenced thereby in trust for the benefit of the holders of the remaining Land Trust Certificates issued hereunder, but subject to all of the provisions of this Article III in respect thereof. Until the transfer of the Reserved Certificates as herein provided, but only so long as the Lessee shall be in possession under the Lease, all rents and other amounts distributable upon the Reserved Certificates (including amounts distributable upon the exercise by the Lessee of the option to purchase contained in the Lease), shall be paid by the Trustee to the Lessee in possession under the Lease.

Section 2. On November 1, 1940, the Trustee shall, by written notice to the Lessee under the Lease, give to such Lessee the right, within sixty days thereafter, to deposit with the Trustee the sum of One Hundred and Fifty Thousand Dollars ($150,000) in gold coin of the United States, or its equivalent, plus an amount in cash
141 estimated by the Trustee to be sufficient to pay all expenses in connection with the acquisition thereby of title to the premises hereinbefore described as Parcel 2. If the Lessee deposits said sum with the Trustee within said sixty days period, the Trustee shall forthwith notify the lessors under the lease described in said Parcel 2, of the exercise by the Trustee, as lessee thereunder, of its option to purchase the fee simple title to the premises covered thereby, and when title thereto is conveyed to the Trustee, it shall utilize the fund so deposited with it to pay the option price and all expenses in connection with the purchase, and within one month thereafter shall duly transfer to the Lessee under the Lease from the Reserved Certificates, Land Trust Certificates repre-

senting 150/3500ths of the equitable ownership and beneficial interest in the Trust Estate. If the Lessee under the Lease does not deposit funds with the Trustee within the period specified above, the Trustee may at any time after the expiration of such period, offer to any party or parties the right to deposit with the Trustee the sum of money aforesaid. If any such party deposits said funds with the Trustee during the period permitted by the Trustee, the Trustee shall forthwith give notice to the lessors under said lease, of the exercise by the Trustee, as lessee thereunder, of its option to purchase the fee simple title to the premises covered thereby, and when title thereto is conveyed to the Trustee, it shall utilize said funds so deposited with it to pay the option price and all expenses in connection with the purchase, and within one month thereafter shall duly transfer to the party or parties making such deposit, from the Reserved Certificates, Land Trust Certificates representing 150/3500ths of the equitable ownership and beneficial interest in the Trust Estate, and shall pay to such party, from moneys or proceeds of the sale of securities in the Depreciation Fund described in the Lease, the sum of Seventy Five Hundred Dollars ($7500), provided that the party to whom the Reserved Certificates are transferred shall, contemporaneously with such transfer, deposit with the Trustee for the benefit of the Lessee an amount of money equal to accrued rentals on the Reserved Certificates so transferred from the last quarterly distribution date to date of transfer, at the rate of $50.00 per each 1/3500th share of equitable ownership evidenced thereby, per annum, unless the date of transfer shall be a quarterly distribution date.

142 SECTION 3. Upon learning of the happening of the event upon which the option to purchase the fee simple title to the premises described in Parcel 3 may be exercised, the Trustee shall, by written notice to the Lessee under the Lease, give to such Lessee the right, within sixty days thereafter, to deposit with the Trustee the sum of One Hundred Thousand Dollars ($100,000) in gold coin of the United States, or its equivalent, plus an amount in cash estimated by the Trustee to be sufficient to pay all expenses in connection with the acquisition thereby of title to the premises hereinbefore described as Parcel 3. If the Lessee deposits said sum with the Trustee within said sixty days' period, the Trustee shall forthwith notify the lessors under the lease described in said Parcel 3, of the exercise by the Trustee, as lessee thereunder, of its option to purchase the fee simple title to the premises covered thereby, and when title thereto is conveyed to the Trustee, it shall utilize the fund so deposited with it to pay the option price and all expenses in connection with the purchase, and within one month thereafter shall duly transfer to the Lessee under the Lease from the Reserved Certificates, Land Trust Certificates representing 100/3500ths of the equitable ownership and beneficial interest in the Trust Estate. If the Lessee under the Lease does not deposit funds with the Trustee

within the period specified above, the Trustee may at any time after the expiration of such period, offer to any party or parties the right to deposit with the Trustee the sum of money aforesaid. If any such party deposits said funds with the Trustee during the period permitted by the Trustee, the Trustee shall forthwith give notice to the lessors under said lease, of the exercise by the Trustee, as lessee thereunder, of its option to purchase the fee simple title to the premises covered thereby, and when title thereto is conveyed to the Trustee, it shall utilize said funds so deposited with it to pay the option price and all expenses in connection with the purchase, and within one month thereafter shall duly transfer to the party or parties making such deposit from the Reserved Certificates, Land Trust Certificates representing 100/3500ths of the equitable ownership and beneficial interest in the Trust Estate, and shall pay to such party, from moneys or proceeds of securities in the Depreciation Fund described in the Lease, the sum of Five Thousand
143 Dollars ($5,000), provided that the party to whom the Reserved Certificates are transferred shall, contemporaneously with such transfer, deposit with the Trustee for the benefit of the Lessee an amount of money equal to accrued rentals on the Reserved Certificates so transferred from the last quarterly distribution date to date of transfer, at the rate of $50.00 per each 1/3500th equitable interest evidenced thereby, per annum, unless the date of transfer shall be a quarterly distribution date.

SECTION 4. If the Lessee at any time procures a conveyance to the Trustee of the title to the premises heretofore described as Parcel 2, the Trustee shall, within one month after such conveyance, duly transfer to the Lessee from the Reserved Certificates, Land Trust Certificates representing 150/3500ths of the equitable ownership and beneficial interest in the premises then held by the Trustee. The Lessee may voluntarily and without notice from the Trustee, at any time after November 1, 1940, deposit with the Trustee the sum of One Hundred and Fifty Thousand Dollars ($150,000) in gold coin of the United States of America, or its equivalent, plus an amount in cash estimated by the Trustee to be sufficient to pay all expenses in connection with the Trustee acquiring title to the premises hereinbefore described as Parcel 2, and upon such deposit the Trustee shall proceed as provided in Section 2 of this Article. The rights of the Lessee under this Section to procure a transfer of the title to the Trustee, or voluntarily deposit said funds with the Trustee, shall not exist during any period during which any party or parties have the right to deposit funds with the Trustee pursuant to notice under Section 2 of this Article, or after any party has deposited funds with the Trustee pursuant to such notice.

SECTION 5. If the Lessee at any time procures a conveyance to the Trustee of the title to the premises heretofore described as Parcel 3, the Trustee shall, within one month after such conveyance, duly transfer to the Lessee, from the Reserved Certificates, Land Trust

Certificates representing 100/3500ths of the equitable ownership and beneficial interest in the premises then held by the Trustee. The Lessee may voluntarily and without notice from the Trustee, at any time after the option to purchase may be exercised under the
144 lease described in Parcel 3, deposit with the Trustee the sum of One Hundred Thousand Dollars ($100,000) in gold coin of the United States of America, or its equivalent, plus an amount in cash estimated by the Trustee to be sufficient to pay all expenses in connection with the Trustee acquiring title to the premises hereinbefore described as Parcel 3, and upon such deposit the Trustee shall proceed as provided in Section 3 of this Article. The rights of the Lessee under this Section to procure a transfer of the title to the Trustee, or voluntarily deposit said funds with the Trustee, shall not exist during any period during which any party or parties have the right to deposit funds with the Trustee pursuant to notice under Section 3 of this Article, or after any party has deposited funds with the Trustee pursuant to such notice.

SECTION 6. The Trustee shall not be required to transfer Reserved Certificates pursuant to this Article until it has received assurance satisfactory to it, by opinion of counsel or otherwise, that there has been conveyed to the Trustee good title in fee simple to the premises described as Parcel 2 or Parcel 3, as the case may be, subject to no liens or encumbrances other than the taxes and assessments not then due and payable and such other liens or encumbrances as in the opinion of counsel satisfactory to the Trustee do not impair the value of said premises; provided, however, that the Trustee, by transferring conveyance of title to either of said premises and/or by issuing Reserved Certificates pursuant thereto, shall not be deemed to have warranted the title so conveyed to it or to have accepted any responsibility with respect thereto.

SECTION 7. All funds deposited with the Trustee pursuant to the provisions of this Article, shall be placed and held by the Trustee in a separate trust fund, designated as "Lazarus Fund", and held therein until applied as herein provided, and all such funds so deposited with the Trustee pursuant to this Article, not used to pay the option price and all expenses in connection with such purchase, shall be refunded by the Trustee to the party making such deposit.

If for any reason the lessors under either of the leases referred to in Parcels 2 or 3 of the Trust Estate shall fail or refuse to transfer to the Trustee, the title to the premises covered thereby, after
145 notice of exercise of the option, the Trustee will, at the request of the party who shall have made the deposit of funds pursuant to this Article, and upon receiving from such party any additional deposits from time to time deemed necessary by the Trustee to meet its expenses and indemnity against all expenses incurred or to be incurred thereby, institute proceedings to compel the conveyance to the Trustee of such title.

ARTICLE IV

The Trustee agrees that, after payment of the compensation of the Trustee provided to be paid in Article XI hereof, and after payment of, (1) the expenses of administering this trust, (2) any taxes, charges, assessments, and any and all amounts, which the Trustee as Lessor under the Lease is authorized or permitted to pay for and on behalf of the Lessee for the protection of the Trust Estate free from lien, charge or encumbrance of any kind or character whatsoever, (3) any Federal or other income tax or taxes, which under any present or future law, the Trustee may be required to pay or withhold upon the receipt by it of the amounts payable to it under the provisions of said Lease, and/or (4) any other tax, rent, charge, assessment or liability which the Trustee may be required to pay, and subject to the provisions of this Declaration, it will distribute among the Beneficiaries in proportion to their respective interests as evidenced by Certificates issued hereunder and at the time outstanding, all the net proceeds of rentals which may be received by it under the terms of the Lease. Such distribution shall be made quarterly on the first business day of March, June, September, and December in each year, the first of said distributions to be made September 1, 1928, for the quarter year ending August 31, 1928, and such payment may be made by check at par in Columbus, Ohio, exchange, and shall be mailed to the holders of Certificates as registered on the Trustee's transfer books as of the twentieth day of the month preceding the month of each such distribution and at their respective addresses as registered on said books. Any such funds not collected by such Certificate holders shall be held by the Trustee without interest to the credit of such holders. The Trustee shall be the sole judge of what shall constitute net income.

146 ARTICLE V

SECTION 1. As provided in the Lease, the Lessee has the option to purchase the entire property comprising the Trust Estate, at any time on and after June 1, 1933, and up to and including May 31, 1938, at Three Million Six Hundred Five Thousand Dollars ($3,605,000); thereafter and up to and including May 31, 1948, at Three Million Five Hundred Seventy Thousand Dollars ($3,570,000), and thereafter during the continuance of the Lease at Three Million Five Hundred Thirty-five Thousand Dollars ($3,535,000); in each case, plus accrued rental to date of purchase, plus all sums, if any, for which the Lessee is in default of payment under said Lease, plus all unpaid expenses and/or charges of the Trustee and a reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof; provided that there shall be credited on such purchase price:

(a) All amounts then in the hands of the Trustee not otherwise due for distribution or payment under the Declaration; and

(b) Any net amounts then in the hands of the Trustee as Lessor under said Lease received as compensation for the appropriation to public use of any part of the demised premises; and

(c) The amount of the Depreciation Fund held by the Trustee as Lessor under the Lease including, to the extent that Land Trust Certificates are in the Depreciation Fund, the amounts distributable thereon; and

(d) The net unappropriated proceeds of any insurance then in the hands of the Lessor and/or Trustee of Insurance under said Lease.

SECTION 2. Upon the exercise by the Lessee of the option to purchase the leased premises, the Trustee, upon receipt of the option price after deducting all necessary expenses, including a reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, shall distribute the net proceeds among the Beneficiaries in accordance with the respective interests held by them, as evidenced by their Certificates and upon their surrender thereof. Distri-
147 bution upon Land Trust Certificates in the Depreciation Fund shall be made by crediting the amount otherwise distributable thereon on the option price, as set forth in the Lease.

SECTION 3. Upon sale by the Trustee of the entire property comprising the Trust Estate, free from the Lease, pursuant to and because of a default by the Lessee in any of the provisions of the Lease, the Trustee, upon receipt of the sale price, after deducting all necessary expenses, including reasonable compensation to the Trustee for its services in connection with the completion of said sale and the distribution of the net proceeds thereof, shall distribute the net proceeds, together with all cash and/or securities or proceeds thereof then in the Depreciation Fund or which have otherwise become the absolute property of the Lessor under the provisions of said Lease, among the Beneficiaries holding outstanding Certificates (other than Certificates in the Depreciation Fund and other than Reserved Certificates then held by the Trustee), in accordance with the respective interests held by them as evidenced by their several Certificates, and upon their surrender thereof, and thereupon all Certificates so surrendered and/or in the Depreciation Fund and Reserved Certificates then held by the Trustee shall be cancelled by the Trustee.

If the Trust be terminated and the Trust Estate sold subject to the Lease while the Lease is still in force and effect, then distribution of the net proceeds of sale shall be made as aforesaid, except that the proceeds of sale applicable to or distributable upon the shares of equitable ownership represented by Land Trust Certificates in the Depreciation Fund, together with any other cash and securities in the Depreciation Fund, shall be paid and delivered over to the purchaser, who shall hold the same subject to the terms of the Lease.

The Land Trust Certificates in the Depreciation Fund shall thereupon be cancelled.

SECTION 4. The Trustee is fully authorized to complete any sale referred to in Sections 2 and 3 of this Article, full power and authority being hereby vested in it, in connection with such sale, to execute all conveyances, releases, cancellations, assignments, and/or other transfers of the property sold as may be necessary or proper
148 to convey title thereto, without securing any consent from the Beneficiaries, and any conveyance by the Trustee shall operate to divest all of the interest of the Beneficiaries in the property so conveyed, the interest of the Beneficiaries being transferred to the proceeds of sale as provided by the terms of this Declaration.

SECTION 5. Notice of any distribution to be made by the Trustee as provided in Section 2 or 3 of this Article, shall be given by registered letter, mailed to the respective Beneficiaries at their several addresses appearing upon the books of the Trustee. If, after notice has been given as aforesaid, the holder or holders of any Certificates shall fail or neglect to present the same at the time and place in said notice specified, the Trustee shall place to the credit of each outstanding Certificate, the distributive share to which its holder is entitled, and shall be subject to no further liability, and under no further duty to the Beneficiary holding the same under the trusts created by this Declaration, except to pay to such holder such distributive share upon demand and upon surrender of said Certificate, nor shall the Trustee be required to pay interest upon any fund so credited.

SECTION 6. The shares of equitable ownership represented by Land Trust Certificates issued hereunder are subject to call purchase by the Trustee, at the request of the Lessee, for the Depreciation Fund described in the Lease, at any time on and after June 1, 1933, and up to and including May 31, 1938, at the price of Ten Hundred Thirty Dollars ($1030) per share; at any time thereafter and up to and including May 31, 1948, at Ten Hundred Twenty Dollars ($1020) per share; and at any time thereafter at Ten Hundred Ten Dollars ($1010) per share; in each case, plus accrued rental to date of call purchase at the rate of Fifty Dollars ($50.00) per share per annum, upon the following terms and conditions, to-wit:

The Lessee may notify the Trustee in writing to apply any moneys then in the Depreciation Fund, including the proceeds of any securities held in the Depreciation Fund, to the call purchase of shares of equitable ownership represented by Land Trust Certificates, and upon the receipt of such notice the Trustee shall determine by lot, in any manner selected by it, the numbers of Certificates evi-
149 dencing shares to be purchased up to the amount so specified in the request from the Lessee, and shall thereupon give to the registered holders of the Certificates so designated, not less than fifteen (15) days' written notice, mailed first-class postage prepaid, to such holders at their respective addresses appearing on the trans-

fer books of the Trustee, of such call purchase of the shares evidenced by the Certificates so designated, and the date fixed for such purchase, and upon the date so designated for the purchase of such shares the holders of such shares shall be entitled, in respect to each share so called for purchase, to the call purchase price thereof as hereinabove specified, and thereafter shall have no other or further interest in the Trust Estate in respect to each share so called for purchase, and on presentation and surrender of such Certificates in accordance with such notice at the principal office of the Trustee, the holders of such Certificate evidencing the shares so called for purchase shall be entitled to receive, in respect to each share so called for purchase, such call purchase price and no more. Upon call purchase of any of said shares and notice mailed as aforesaid, the holders of the Certificates evidencing the shares so called for purchase will deliver the same to the Trustee, duly transferred to the Trustee and acknowledged as provided on said Certificates. If the shares so called for purchase shall be less than the entire number of shares evidenced by such Certificates so surrendered, the Trustee shall issue a new Certificate evidencing the equitable interests not so called for purchase. The shares so purchased shall be transferred to the Trustee and in its name and be held as a part of the Depreciation Fund as set forth in the Lease, and no merger of the equitable and legal title shall result therefrom. If, after notice has been given as in this paragraph provided, the holder or holders of any shares so called for purchase shall fail or neglect to present the same at the time and place in said notice specified, the Trustee shall place to the credit of each such share the call purchase price and shall be subject to no further liability and under no further duty to the Beneficiary holding such share, except to pay to the holder of each such share the call purchase price thereof upon demand and upon surrender of such certificate, nor shall the Trustee be required to pay interest upon any fund so credited.

150 ARTICLE VI

As the entire premises constituting the Trust Estate are leased for Ninety-nine (99) years, renewable, at the option of the Lessee, for additional terms of Ninety-nine (99) years, the ordinary duties of the Trustee shall be restricted to the collection of rent from the Trust Estate and the distribution of the net rentals thereof as herein provided.

In the event that the Lessee shall make default in any of the provisions of the Lease, so that it shall become necessary, or in the opinion of the Trustee advisable, for the Trustee to terminate the same, then the Trustee shall have full authority to terminate the the Lease and to sell the Trust Estate (including all securities then held in the Depreciation Fund) and terminate the trust, and in such case or in any other contingency, either with or without terminating

the Lease, to take such other action with respect to the Lessee, the Lease, or the Trust Estate (including all property then held in the Depreciation Fund) as it shall deem advisable.

ARTICLE VII

No Beneficiary, as such, shall have any legal title to the trust property itself, or any part thereof, real or personal, held by the Trustee, his interest being an equitable estate only, and he shall have no right to call for any partition of the Trust Estate during the continuance of the trust, any and all such rights being waived by the Beneficiaries, by acceptance of the Certificates. Neither the death of a Beneficiary nor any transfer by operation of law of the interest of a Beneficiary during the continuance of this trust shall operate to terminate the trust, nor shall it entitle the legal representative of a deceased Beneficiary to an accounting or to take any action in the courts or otherwise against the Trust Estate or the Trustee.

Notwithstanding any transfer by operation of law of the interest, or any part thereof, of a Beneficiary as aforesaid, the Trustee shall be fully protected in paying and accounting to the personal representatives of any deceased Beneficiary with respect to all matters arising under this trust, and the rights of any such transferee shall accrue and be enforcible against and be binding upon such
151 personal representatives and not against or upon the Trustee or the Trust Estate, until such transferees shall have established to the satisfaction of the Trustee their succession to such interest.

If the interest of any Beneficiary shall be devised to a trustee or trustees, the Trustee hereunder shall be protected in dealing with such representative without reference to any question of the capacity of such trustee to act in the State of Ohio, and all persons claiming under such deceased Beneficiary shall be estopped to compel any accounting as against the Trustee hereunder.

ARTICLE VIII

No assessment shall ever be made upon the Beneficiaries, and the Trustee shall have no power to incur any obligation which shall render the Beneficiaries personally liable, and in any written contract made by the Trustee reference shall be made to this instrument, and the person or corporation contracting with the Trustee shall look only to the funds and property of the trust for payment under such contract, or for the payment of any debt, note, judgment, or decree, or of any money that may otherwise become due and payable by reason of the failure on the part of the Trustee to perform such contract in whole or in part, or for any other cause, and neither the Trustee nor the Beneficiaries, present or future, shall in any event be personally liable therefor.

ARTICLE IX

The Trustee shall keep a register of the names and interests of the Beneficiaries hereunder, and proper transfer books, and books of account showing the receipts and disbursements of the Trust Estate. Such books of account and transfer, including the register of names and interests, shall at all reasonable times be open to the inspection of any Beneficiary or his personal representatives, insofar as they relate to the interest of such Beneficiary, but not as they relate to the interest of any other Beneficiary.

Land Trust Certificates and the equitable interest in the trust estate evidenced thereby may be transferred and conveyed in full shares of one thirty-five hundredths each, but not in fractions thereof, by the owner or owners thereof, in person or by attorney duly
152 authorized, and upon presentation to the Trustee of any such Certificate, duly executed for transfer in the form hereinbefore recited conveying the equitable interest evidenced by such Certificate, the Trustee will execute and deliver to such transferee a new Land Trust Certificate or Certificates representing the equitable interest in the Trust Estate so transferred, and such transferee shall, by accepting such Certificate and the equitable interest evidenced thereby, so transferred to him, or any new Certificate issued in place thereof, become a party to the Declaration and be bound thereby and entitled to all of the rights thereunder; but no conveyance or transfer of a Certificate or the equitable ownership evidenced thereby, or any interest therein, shall be valid or binding upon the Trustee or upon the holder of such Certificate or any new Certificate or Certificates issued in place thereof, until the Certificate so conveyed or transferred or evidencing the equitable ownership or interest therein, so conveyed or transferred, shall be surrendered to the Trustee and a new Certificate or Certificates issued in place thereof, as herein provided for, and notation thereof made upon the books of the Trustee, and the Trustee and any holder of a Certificate issued by the Trustee shall be entitled to rely upon the record of ownership and of interests therein as shown on the Trustee's books, and neither the Trustee nor the holder of any Certificate issued by the Trustee shall be bound by any notice, actual or constructive, to the contrary.

ARTICLE X

The Trustee does not warrant its title as owner of the premises hereinbefore described as the Trust Estate, nor the interest of any Beneficiary, nor make any representations with reference thereto, nor does it warrant the validity of the Lease, nor of any other lease of the said premises which may hereafter be made, nor guarantee the performance of the covenants thereof by the Lessee or any Lessees thereunder.

The Trustee shall be protected in acting upon any notice, request, consent, affidavit, certificate, assignment, note, or other paper or document believed by it to be genuine and to be signed by the proper party.

The Trustee at any time may, in its individual capacity or as Trustee for any other estate or individual, own or acquire Cer-
153 tificates to the same extent and with the same effect as if it were not Trustee hereunder.

The Trustee shall be entitled to indemnity from the Trust Estate for any personal liability or expense by it incurred in the administration of this trust, except such as may arise from its personal willful default.

The Trustee shall have full power to compromise and settle claims either in contract or tort made against it or against the Trust Estate.

The Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of this trust so long as it acts in good faith; nor shall it be personally liable for the acts or omissions of any officer, agent, servant, or employee selected or appointed by, or acting for, it (reasonable care having been used in their selection), and it shall not be obliged to give any bond to secure the due performance of this trust by it.

The Trustee shall have the power, in the event that it should become necessary for it to provide funds to meet a temporary exigency arising in connection with the Trust Estate, or to enable it to comply with any of the provisions of said Lease, to make advances at reasonable or customary rates of interest or borrow money and give notes or other security therefor binding the income and assets of the trust, but not the Trustee or Beneficiaries personally. Any such advances or indebtedness shall be paid by the Trustee prior to and ahead of any other disbursement made by it.

The trustee may advise with legal counsel, and any action or failure to act under this Trust Agreement in good faith by the Trustee in accordance with the opinion of such counsel shall be conclusive on the Beneficiaries, and the Trustee shall be fully protected in respect thereof.

Whenever in this instrument or in any Certificate issued hereunder, the Trustee is obligated to pay or distribute any sum of money to the holders of such Certificates or to any other person, it is understood that all such obligations are undertaken by it in its trust capacity only and not personally, and that such payments and distributions are to be made only out of such funds as the Trustee has in its hands available therefor.

154 The Trustee shall have the exclusive right to control the Trust Estate as it may deem for the best interests of the Beneficiaries, free from all control by the Beneficiaries, as fully and

to the same extent as though the Trustee were the sole legal and equitable owner thereof, and shall not be subject to any obligations to the Beneficiaries other than such as are expressly assumed hereunder, and shall be entitled to exercise all of the rights, remedies, and powers of the Lessor under the Lease. The Trustee shall likewise have full and unrestricted power and authority to enter into, execute, and deliver any agreements and instruments modifying, amending, or supplementing the Lease if and when in the sole and absolute discretion of the Trustee, it shall appear wise, expedient, or proper so to do.

ARTICLE XI

The compensation of the Trustee for its ordinary services hereunder shall be at the annual rate of Thirty-two Hundred and Fifty Dollars ($3,250) until the Trustees shall have acquired the lessor interests or estates in the real estate described in either or both of Parcel 2 and Parcel 3 above; upon and after the acquisition by the Trustee of the lessor interest and estate in the real estate described as Parcel 2 above, there shall be added to the Trustee's compensation the annual sum of One Hundred Fifty Dollars ($150); and upon and after the acquisition by the Trustee of the lessor interest and estate in the real estate described as Parcel 3 above, there shall be added to the Trustee's compensation the further additional annual sum of One Hundred Dollars ($100); in all cases such compensation shall be payable quarterly on the first business days of March, June, September, and December in each year, the first installment being payable September 1, 1928, being the amounts payable under Section 2 of Article Two of the Lease, said compensation to be deducted from the gross income of the Trust Estate; and in the event that it should become necessary for the Trustee at any time to render extraordinary services in the carrying out of any of the provisions of the trust created by this Declaration, it shall be entitled to receive additional reasonable compensation therefor, and such compensation, together with any and all expenses, charges, or liabilities made, incurred or discharged by the Trustee under the terms and con-
155 ditions of this Declaration, shall be a lien against and paid from the Trust Estate and/or the income derived therefrom; provided, however, that if extraordinary services shall be rendered by the Trustee with respect to any particular Certificate or with respect to the interest evidenced thereby, or any part thereof, and not with respect to the trust estate as a whole, then compensation for such services, together with any and all expenses, charges, or liabilities made, incurred, or discharged by the Trustee in connection therewith shall be a lien against the interest evidenced by such certificate and be paid from the proceeds thereof and/or the income therefrom.

ARTICLE XII

In the event that the Trustee or any successor hereafter appointed shall desire to relinquish the trust evidenced by this agreement the Trustee shall select a successor Trustee believed by it to be competent, and shall give notice of its intention to resign and the appointment of a successor Trustee to all the Beneficiaries, either by registered letter sent to their addresses registered on the transfer books of the Trustee, such notice to be deemed to have been given by the mailing of said letter, or by publication once a week for four consecutive weeks in one newspaper published and of general circulation in the City of Columbus, Ohio. The Trustee may file for record in the Recorder's Office of Franklin County, Ohio, a copy of such resignation and appointment. In the event of a vacancy occurring in the office of the Trustee, by resignation or otherwise, and the failure or neglect of the predecessor Trustee to select a successor, then any Beneficiary or the predecessor Trustee may apply to a court of general equity jurisdiction in Franklin County, Ohio, for the appointment of a successor Trustee. The successor Trustee appointed by either of the methods above provided shall be vested with the title, property, powers, rights, discretions, and immunities of the predecessor Trustee, and upon conveying the Trust Estate to a successor Trustee appointed by either of the methods above provided and upon accounting for all funds which have previously come into its possession, and surrendering all certificates, papers, and documents held by it in connection with said trust, the predecessor Trustee shall be discharged from further liability.

156 Any successor Trustee appointed under the provisions of this Article shall be a bank or trust company authorized to do a trust business in Columbus, Ohio, if there be such, willing and able to accept the trusts hereunder upon the terms herein set forth. Such successor corporation may file for record in the Recorder's Office aforesaid its acceptance as Trustee hereunder.

In the event of the consolidation or merger of The Huntington National Bank of Columbus (of Columbus, Ohio), or of any successor Trustee, with any other corporation, such consolidated corporation shall succeed to the title, rights, powers, discretion, and immunities of the original Trustee, subject to the terms and conditions of this Trust Agreement. The purchase of the assets and the assumption of the liabilities of any corporation then Trustee hereunder, shall also be treated as a merger or consolidation, as provided for in this Article.

ARTICLE XIII

The term "Trustee" shall be deemed to include The Huntington National Bank of Columbus, Trustee, or any successor which or who may hereafter be appointed under any of the provisions of this

instrument, and any such successor Trustee shall be vested with all of the title, property, powers, rights, discretions, and immunities which are herein vested in the Trustee herein named. The term "holder" or "holder of Land Trust Certificates," wherever used in any Certificate issued hereunder, or in this Declaration with reference to any Certificate, shall mean the owner of the equitable interest in the Trust Estate evidenced by such Certificate as registered on the books of the Trustee.

ARTICLE XIV

All Land Trust Certificates held in the Depreciation Fund hereinbefore referred to and all Land Trust Certificates held by the Trustee pursuant to Article III hereof, shall, for all purposes hereof, be deemed outstanding hereunder.

ARTICLE XV

By the acceptance of any Certificate issued hereunder, the
157 original or any successive holder shall be deemed to assent to all of the provisions contained in this Declaration.

ARTICLE XVI

This Declaration may be amended, or trust terminated, by written instrument executed and acknowledged by the Trustee and consented to in writing by three-fourths in interest of the Beneficiaries, exclusive of ownership of Land Trust Certificates in the Depreciation Fund, except that no such amendment shall increase the obligations of the Lessee under the Lease without the written consent of such Lessee. A copy of any such instrument shall be filed by the Trustee in the office of the Recorder of Franklin County, Ohio.

Unless sooner terminated, this Trust shall terminate on the expiration of the first term of ninety-nine years of this Lease. In case of the termination of this Trust otherwise than pursuant to the exercise by the Lessee of its option to purchase the Trust Estate, distribution shall be made by the Trustee, in kind, of the Trust Estate and the cash and securities then in the Depreciation Fund, if it then be a part of the Trust Estate, in such manner as the Trustee in its discretion may determine, or at the election of the Trustee, by sale of the Trust Estate and the securities then in the Depreciation Fund, if it then he a part of the Trust Estate, and the distribution by the Trustee of the proceeds of such sale, in either case pro rata to the Beneficiaries in the manner provided in Article V hereof.

In witness whereof, said The Huntington National Bank of Columbus, as Trustee, has caused these presents to be signed in its

corporate name by its Vice President and its corporate seal to be hereunto affixed and attested by its Assistant Cashier, as of the day and year first aforesaid.

[CORPORATE SEAL]

THE HUNTINGTON NATIONAL BANK OF COLUMBUS,
Trustee.
By B. S. WELLMAN, *Vice President.*

Attest:
E. R. NEAL, *Cashier.*

In the presence of:
LOWRY SWEENEY.
F. J. WRIGHT.

158 STATE OF OHIO,
Franklin County, ss.

Before me, a Notary Public in and for said County, personally appeared B. S. Wellman and E. R. Neal, to me known and known to me to be the Vice President and Cashier, respectively, of The Huntington National Bank of Columbus, Trustee, the corporation which executed the foregoing Agreement and Declaration of, Trust, and severally acknowledge that they did sign and seal said instrument for and on behalf of said corporation, and that the same is their free act and deed as such officers respectively and the free and corporate act and deed of said The Huntington National Bank of Columbus, Trustee.

In testimony whereof, I have hereunto set my hand and official seal this 27th day of June 1928.

[NOTARIAL SEAL] F. J. WRIGHT, *Notary Public.*

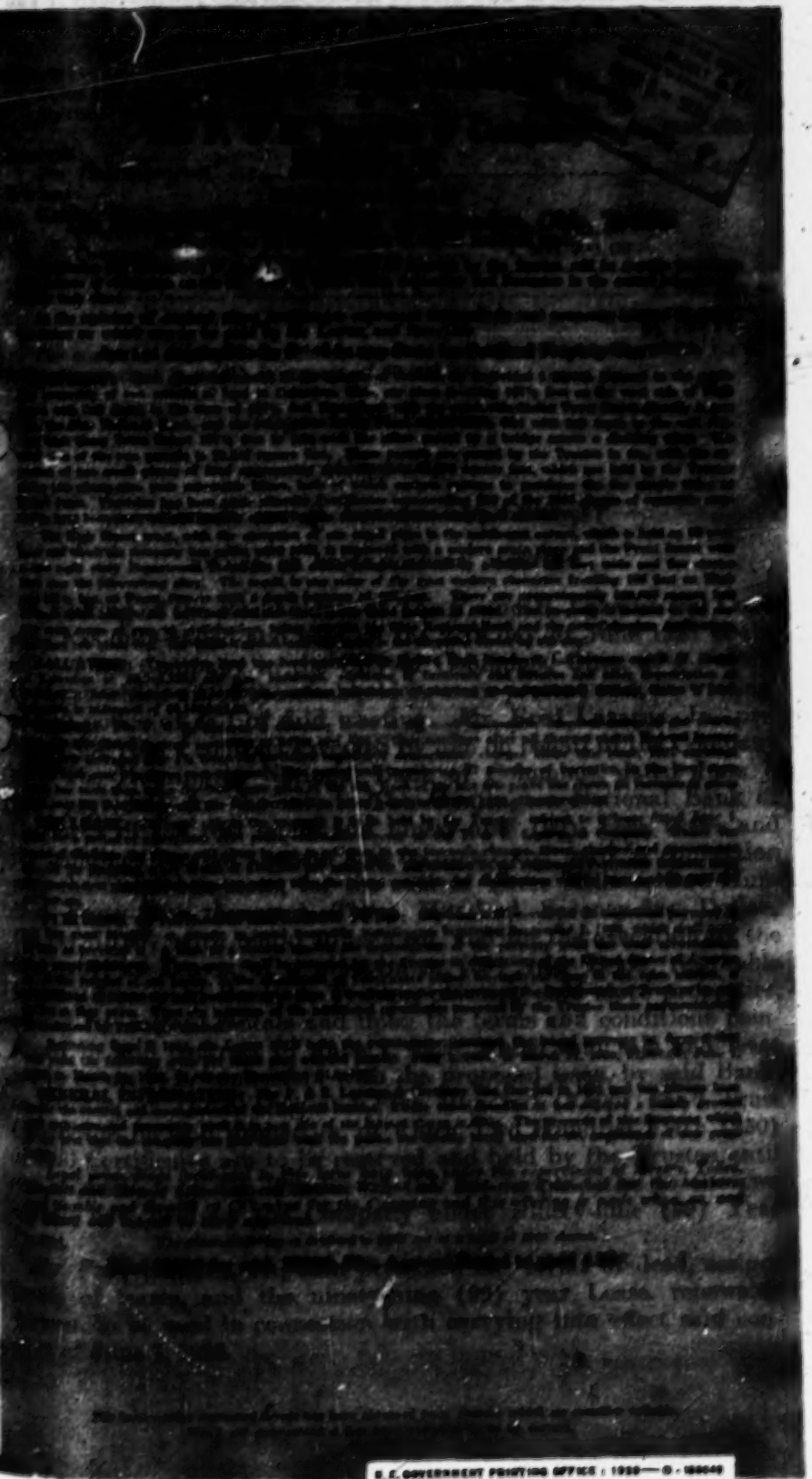
161 THE F. & R. LAZARUS & COMPANY

BALANCE SHEET

Based upon Balance Sheet as of the close of business January 31, 1928, prepared by Messrs. Ernst & Ernst, adjusted by them to give effect to the present financing.

ASSETS

Current:		
Cash on hand and on deposit	$329,224.50	
Accounts Receivable less Allowance	1,249,810.54	
Inventory—as certified by Company	1,853,591.07	
		$3,432,626.11
Other assets:		
Miscellaneous Accounts and Investments		1,887,130.06
Permanent:		
Furniture, Fixtures, and Automobiles, less allowances for depreciation		761,836.04
Deferred:		
Unexpired Insurance Premiums, Supplies, etc		48,518.14
		$6,130,111.21



U. S. GOVERNMENT PRINTING OFFICE : 1938 — O - 180049

LIABILITIES

Current:		
Notes and Accounts Payable	$678,793.03	
Accrued Expenses	149,879.55	
		$828,672.58
Reserves:		
For Contingencies, etc		138,128.14
Nominal:		
Capital Stock Outstanding:		
Preferred	$1,000,000.00	
Common	1,300,000.00	
		2,300,000.00
Surplus		2,863,310.49
		$6,130,111.21

*The company does not carry its leasehold estate on its books, which on the basis of appraisal is worth in excess of $3,000,000.

162 *Respondent's Exhibit A*

(Copy of)

THE F. AND R. LAZARUS AND COMPANY

RECORD OF STOCKHOLDERS' MEETING

A meeting of the stockholders of The F. and R. Lazarus and Company was duly called and held on the 27th day of June 1928 at the office of the Company in the City of Columbus, Ohio, at 4 o'clock, P. M., at which all of the stockholders were present and, in writing, waived notice of call of said meeting. Mr. Fred Lazarus, Jr., presented and read a contract executed by him on behalf of the Company with The Huntington National Bank of Columbus, dated June 7, 1928, providing for the sale to The Huntington National Bank of Columbus of the real estate and ninety-nine (99) Year leases and the buildings located thereon and occupied and used in connection with the Columbus store, for the sum of Three Million, One Hundred Forty-four thousand, Three Hundred Seventy-five Dollars ($3,144,375.00), with rental adjustment, and for the execution by the Company, as Lessee, of a ninety-nine (99) year Lease, renewable forever, from said Bank, as Trustee, covering said store properties, calling for certain rentals and upon the terms and conditions mentioned in said contract of June 7, 1928, which said sale and lease are to be made in connection with the proposed issue, by said Bank, as Trustee, of Three Thousand Five Hundred (3,500) Land Trust Certificates on said properties, of which Two Hundred Fifty (250) of said Certificates are to be reserved and held by the Trustee until the acquisition by the Trustee of the fee simple titles to the two parcels now held by the Company under Ninety-nine (99) Year leases.

Mr. Fred Lazarus, Jr., then presented the forms of deed, assignments of leases, and the ninety-nine (99) year Lease, renewable forever, to be used in connection with carrying into effect said contract of June 7, 1928.

On motion of Mr. Robert Lazarus, the following resolution was unanimously adopted:

Resolved: That said contract of June 7, 1928, between The Huntington National Bank of Columbus and The F. and R. Lazarus and Company, be, and the same is hereby, ratified, approved, and
163 confirmed; that the forms of deed and assignments of leases and also the ninety-nine (99) Year lease, renewable forever, dated as of June 1, 1928, be, and the same are hereby, approved; that the Directors of the Company be, and they are hereby, instructed to authorize the officers of the Company to execute and deliver, for, and on behalf of, the Company, said deed, assignments of leases, and ninety-nine (99) year Lease, renewable forever, and further to do any and all things that may be necessary or desirable to carry into effect and comply with the terms, provisions, covenants, and conditions of the contract of June 7, 1928, or which they may deem advisable in order to consummate said transaction.

On a vote being taken, thirteen thousand (13,000) common shares and ten thousand (10,000) Preferred shares, voted in favor of said resolution and no shares voted against said resolution.

We hereby waive notice of this meeting and consent to the sale of the real estate above mentioned to The Huntington National Bank of Columbus.

(Signed by) SIMON LAZARUS,
FRED LAZARUS, Jr.,
ROBERT LAZARUS,
JEFFREY L. LAZARUS,
HENRY GUMBLE.

There being no further business to come before the meeting upon motion the same was adjourned.

(Signed by) SIMON LAZARUS,
President.

(Signed by) FRED LAZARUS, Jr.

I hereby certify that the foregoing is a true copy of the proceedings of the meeting of the stockholders of The F. and R. Lazarus and Company held at the time and place hereinabove specified.

[SEAL] (Signed) FRED LAZARUS, Jr.,
Secretary of The F. and R. Lazarus and Company.

COLUMBUS, OHIO, *June 27, 1928.*

164 *Respondent's exhibit B*

[Copy of]

THE F. AND R. LAZARUS AND COMPANY

RECORD OF DIRECTORS' MEETING

Pursuant to call and notice duly given in accordance with law and the Regulations of the Company, the Directors of The F. and

R. Lazarus and Company met at the office of the Company in the City of Columbus, Ohio, on the 27th day of June, 1928, at 4:30 o'clock, P. M., for the purpose of considering and authorizing the Company to sell to The Huntington National Bank of Columbus its real estate and ninety-nine (99) year Leases and the buildings located thereon and occupied and used in connection with its Columbus store, for the sum of Three Million, One Hundred Forty-four Thousand, Three Hundred Seventy-five Dollars ($3,144,375.00), with rental adjustment, and after such sale to lease said premises, including buildings thereon, under a ninety-nine (99) year Lease, renewable forever, from The Huntington National Bank of Columbus, as Trustee; and for such other business as might come before the meeting.

Present: Simon Lazarus, Fred Lazarus, Jr., Robert Lazarus, Jeffrey Lazarus, and Henry Gumble.

Absent: None.

Mr. Fred Lazarus, Jr., presented and read a contract executed by him on behalf of the Company with The Huntington National Bank of Columbus, dated June 7, 1928, providing for the sale to The Huntington National Bank of Columbus of the real estate and ninety-nine (99) year leases and the buildings located thereon and now occupied and used in connection with the Columbus store, fronting on High, Town, and Front Streets, for the sum of Three Million, One Hundred Forty-four Thousand, Three Hundred Seventy-five Dollars ($3,144,375.00), with rental adjustment, and for the execution by the Company, as Lessee, of a ninety-nine (99) year Lease, renewable forever, from said Bank, as Trustee, covering said store properties, calling for certain rentals and upon the terms and conditions mentioned in said contract of June 7, 1928, which said sale and lease are to be made in connection with the proposed issue by said Bank, as Trustee, of three thousand five hundred (3,500) Land Trust Certificates on said properties, of which certificates two hun-
165 dred fifty (250) shall be held and reserved by the Trustee until the acquisition by the Trustee of the fee simple titles to the real estate now held under ninety-nine (99) year Leases.

Mr. Robert Lazarus moved that said contract of June 7, 1928 between The Huntington National Bank of Columbus and the Company be approved, ratified, and confirmed. Duly seconded and unanimously carried.

On motion of Mr. Robert Lazarus the following resolution was unanimously adopted:

Resolved: That the President and Secretary of the Company be and they are hereby, authorized and directed in the name and on behalf of the Company, to sell to The Huntington National Bank of Columbus, for the sum of Three Million, One Hundred Forty-four Thousand, Three Hundred Seventy-five Dollars ($3,144,375), with rental adjustment, the real estate and ninety-nine year leases, and the buildings located thereon, situated in Columbus, Ohio, and bounded on the north by Chapel Street, on the east by High Street, on the south by Town Street, and on the west by Front Street (exclu-

sive of Wall Street); to lease from said Bank, as Trustee, said real estate and leaseholds for a period of ninety-nine (99) years, renewable forever, and in the name and on behalf of the Company to execute and deliver such deeds, conveyances, and assignments of leases covering said properties and a ninety-nine (99) year Lease, renewable forever, and such other documents and instruments in connection therewith as in their judgment and discretion may be necessary and proper.

An Aye and Nay vote on said resolution being called for, the following Directors voted Aye: Simon Lazarus, Fred Lazarus, Jr., Robert Lazarus, Jeffrey Lazarus, and Henry Gumble.

No directors voted Nay.

The President thereupon declared said resolution to have been unanimously carried.

The President then submitted the forms of deed, assignments of ninety-nine (99) year leases and also the ninety-nine (99) year Lease, renewable forever, dated as of June 1, 1928, proposed
166 to be executed and delivered on behalf of the Company for the purpose of carrying into effect the foregoing resolution.

On motion of Mr. Robert Lazarus, the following resolution was unanimously adopted:

Resolved: That the forms of deed, assignments of ninety-nine (99) year leases and the ninety-nine (99) year Lease, renewable forever, dated as of June 1, 1928, submitted by the President to be executed by the Company in connection with the sale and transfer of said real estate and ninety-nine (99) year leases and the buildings thereon, to The Huntington National Bank of Columbus, and also the ninety-nine (99) year Lease, renewable forever, from The Huntington National Bank of Columbus, as Trustee, to the Company, dated as of June 1, 1928, be and the same are hereby, approved; and the President and Secretary of the Company be and they are hereby authorized and directed for and on behalf of The F. and R. Lazarus and Company to sign, execute, and deliver said deed, assignments, and Lease in the forms hereinabove submitted and approved; and be it further

Resolved: That the President and Secretary of the Company be, and they are hereby, empowered, authorized, and directed for and on behalf of the Company to do any and all things that may be necessary or desirable to carry into effect and comply with the terms provisions, covenants, and conditions of said contract of June 7, 1928, or which they may deem advisable in order to consummate said sale and lease.

There being no further business before the meeting, on motion the same adjourned.

(Signed by) SIMON LAZARUS,
President.

Attest:

(Signed by) FRED LAZARUS, JR.,
Secretary.

167 *Respondent's exhibit C*

[Copy of]

COLUMBUS, OHIO, *June 28th, 1928.*

A special meeting of the Directors of The F. & R. Lazarus & Company was held on the above date at its offices in the City of Columbus, Ohio, at eleven o'clock A. M., with all directors present. Simon Lazarus, the President, presided and Fred Lazarus, Jr., acted as secretary of the meeting.

The Secretary reported that in the consummation of the sale of the Lazarus properties as authorized by the Board at its meeting on June 27th, 1928, it was required by counsel representing The Huntington National Bank that title insurance should be obtained to cover the title relating to the leasehold interest in the Hutchinson et al. ninety-nine year lease and the so-called Eberly warehouse property which the Company had acquired some years ago, and that The Huntington National Bank had made application for title insurance in the sum of Five Hundred Thousand Dollars ($500,000.00) to the Guarantee Title and Trust Company of Columbus, Ohio, and that said Company was willing to issue its insurance policy to The Huntington National Bank, Trustee, in the above amount, conditioned that The F. & R. Lazarus & Company would execute its indemnity contract with The Guarantee Title and Trust Company to hold and save harmless from any loss or liability it may sustain or incur by reason of the issuing of said policy of insurance. The subject matter having been fully discussed, it was on a motion made, seconded, and unanimously carried.

Resolved: That the President and Secretary of this Company for, and in its name and in its behalf, and they are hereby authorized to execute an indemnity agreement with the Guarantee Title and Trust Company of Columbus, Ohio, according to the terms, conditions, and provisions thereof, said contract of indemnity being now before the Board and its provisions approved.

There being no further business the meeting, on motion, adjourned.

(Signed by) SIMON LAZARUS,
President.

(Signed by) FRED. LAZARUS, JR.,
Secretary.

168 Before United States Board of Tax Appeals

Praecipe for record—Nos. 69481 and 69750

(Filed March 24, 1937)

To the Clerk of the United States Board of Tax Appeals.

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, copies

duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Sixth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board, (a) Petition, including annexed copy of deficiency letter. (b) Answer.
3. Findings of fact, opinion, and decisions of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Statement of evidence as settled and allowed.
6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
7. This praecipe.

(Signed) MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 17th day of March 1937.

(Signed) ROBERT P. GOLDMAN,
(Signed) HARRY STICKNEY,
Attorneys for Respondent on Review.

No Counter-Praecipe will be filed.

(Signed) ROBERT P. GOLDMAN,
(Signed) HARRY STICKNEY,
Attorneys for Respondent on Review.

169 [Clerk's certificate to foregoing transcript omitted in printing.]

Before United States Board of Tax Appeals

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United States Circuit Court of Appeals for the Sixth Circuit, be and it is hereby, extended to June 20, 1936.

(Signed) EUGENE BLACK, *Member.*

Dated, Washington, D. C., Dec. 14, 1935.

Now, April 7, 1937, the foregoing is certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

170 Before United States Board of Tax Appeals

Order enlarging time

On motion of counsel for the petitioner and with the consent of counsel for the F. and R. Lazarus and Company to the granting thereof, it is:

Ordered: That the time for the preparation of the evidence and the transmission and delivery of the record sur petition for review of the above-entitled proceedings in this Court, be, and it is hereby, extended to September 1, 1936.

The Clerk of the Court will transmit to the Clerk of the United States Board of Tax Appeals a certified copy of this Order.

[SEAL] (Signed) CHAS. H. MOORMAN,
Circuit Judge.

A true copy.
Attest:

(Signed) J. W. MENZIES,
Clerk, U. S. C. C. A., 6th Circuit.

Now, April 7, 1937, the foregoing is certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of
171 the above-entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be, and it is hereby, extended to March 1, 1937.

(Signed) C. ROGERS ARUNDELL, *Member.*

Dated Washington, D. C., Aug. 21, 1936.

Now, April 7, 1937, the foregoing is certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Order enlarging time

These proceedings were called from the Day Calendar of February 24, 1937, for hearing on motion of counsel for the Commissioner of Internal Revenue that the time within which to complete the record and transmit it to the United States Circuit Court of Appeals for the Sixth Circuit be extended from March 1, 1937, to and including

October 1, 1937. Counsel for the parties were present, and upon due consideration, it is

Ordered that the time for the preparation of the evidence and transmission and delivery of the record sur petition for review in each of the above-entitled proceedings by the United States Circuit Court of Appeals, Sixth Circuit, be, and it hereby is, extended to April 1, 1937.

(Signed) CHARLES P. SMITH, *Member.*

Dated February 24, 1937.

Now, April 7, 1937, the foregoing is certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

172 Before United States Board of Tax Appeals

Order enlarging time

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled proceedings in the United States Circuit Court of Appeals for the Sixth Circuit be, and it is hereby, extended to April 15, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., March 29, 1937.

Now, April 7, 1937, the foregoing is certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

ROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause Argued and Submitted December 13, 1938

Before HICKS, ALLEN, and HAMILTON, JJ.

This cause is argued by Helen R. Carloss for Commissioner of Internal Revenue and by R. P. Goldman and Harry Stickney for the F. & R. Lazarus & Company and is submitted to the court.

Decree

Entered February 16, 1939

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel. On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby affirmed.

Opinion

Filed February 16, 1939

United States Circuit Court of Appeals, Sixth Circuit

No. 7686

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE F. & R. LAZARUS & COMPANY, RESPONDENT

No. 7687

THE F. & R. LAZARUS & COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petitions to Review Decisions of the United States Board of Tax Appeals

Decided February 16, 1939

Before HICKS, ALLEN, and HAMILTON, Circuit Judges

HICKS, Circuit Judge. These cases were consolidated before the Board of Tax Appeals and involve the redetermination of deficiencies in the income tax of the F. & R. Lazarus & Company (herein

called the Company) in the amounts of $3,084.00 for 1930, and $10,349.39 for 1931. The issues were the right of the Company (1) to take depreciation on buildings occupied under a 99-year lease (the first case) and (2) to deduct as ordinary and necessary business expenses certain charitable contributions (the second case).

The Board allowed the deductions for depreciation, reducing the allowance slightly, and the Commissioner seeks to review that decision; but it denied the deductions for charitable contributions, which action the Company seeks to review.

No. 7686. The Company, an Ohio corporation, operated the largest department store in Columbus. It conducted its business in three buildings. Two of them were on land it owned in fee, and the third on lots held under ninety-nine year leases with options to purchase. It had constructed the three buildings at an approximate cost of two and one-half million dollars.

To finance the construction of the largest of the buildings the Company had, in 1926, borrowed $1,700,000.00 from the Northwestern Mutual Life Insurance Company on a ten-year mortgage. In 1928 it purchased the controlling stock in the John Shillito Company of Cincinnati and financed this purchase by issuing short-term notes due in six months for approximately a million and a half dollars. These notes were bought by the A. G. Becker & Company.

Desiring to reduce its current indebtedness, the Company's board, in May, 1928, instructed its Secretary-Treasurer to endeavor to cancel the Northwestern mortgage and "* * * to negotiate another and larger first mortgage for a period not less than twenty-five years or a so-called 'Fee Certificate' issue; either plan to provide an amount in excess of $3,000,000.00 in order to cover the refunding of the Northwestern Mutual Life Insurance Company mortgage, and to provide * * * funds necessary for the acquisition of the Shillito interest * * *"

B. G. Huntington, President of the Huntington National bank of Columbus, from which the loan was obtained, testified that it was negotiated in the form of a land trust certificate issue and that this was almost the only possible plan because of the local taxation on mortgage bonds.

The plan worked out with the Bank took effect on June 1, 1928. Thereunder the Company in a transaction involving the borrowing of $3,250,000.00 less discount, gave the Bank, as Trustee, a deed in fee simple and free from incumbrances, to the property held in fee, and assignments of the title to the two ninety-nine year leases. The mortgage to Northwestern was paid and the Bank as Trustee leased all the property involved to the Company for ninety-nine years, renewable with an option to purchase at stated scheduled prices.

The Trustee issued 3,500 separate "Certificates of Equitable Ownership" each representing 1/3500 of the equitable ownership and

beneficial interest in the property.[1] The Trustee executed a "Declaration of Trust" reciting that it held title to the real estate in trust for the owners of the certificates and that it would pay to each certificate holder his pro rata share of the net proceeds of the property derived by the Trustee from the annual rental of $175,000.00 paid by the Company and amounting to $50.00 for each certificate.

In its returns for the years involved the Company claimed an annual depreciation on the three buildings occupied by it under the lease of $61,698.14 based upon a useful life of forty years and being 2½% of the investment of approximately two and a half million dollars. The Commissioner disallowed any deduction for depreciation on the ground that the right to take depreciation followed the legal title.

The Company insists that, although its deed to the Bank as Trustee was absolute in form, the transaction was in reality a mortgage to secure a loan and that it therefore retained its right to take deductions for exhaustion, wear and tear of the property conveyed, including a reasonable allowance for obsolescence. Rev. Act 1828, Ch. 852, Sec. 23 (k), 45 Stat. 791.

The facts are similar to those in Commissioner v. H. F. Neighbors Realty Co., 81 Fed. (2d) 173 (C. C. A. 6), in which this court treated a deed absolute in form as a mortgage for the purpose of determining whether the transaction in question was a loan or sale resulting in taxable gain. In the Neighbors case bonds were about to mature and other obligations were coming due which needed refinancing; here there was an unmatured mortgage and a large number of short term notes which it was necessary to bring into one obligation. In each case the ratio of the appraised value of the property conveyed to the amount of trust certificates issued thereon was roughly the same, being in round numbers two million dollars to nine hundred fifty-five thousand dollars, in the Neighbors case, and six and one-half million to three and one-half million here. In the Neighbors case the interest rate paid on the thousand certificates out of the fixed annual rental amounted to 5½%. Here the Company agreed to pay the Trustee during the term of the lease an annual rental of $175,000.00 on the 3,500 certificates, or actually $162,500.00 on 3,250 certificates, in addition to the rentals payable under the original leases on parcels 2 and 3. Distributed pro rata, this provided an income of 5% on each certificate. In addition, the Company agreed to pay all taxes, etc., which might be levied on the leased premises. In the Neighbors case, as in this, the taxpayer had the option (1) to renew the lease for ninety-nine years in perpetuity; or (2) to redeem the certificates after the lapse of a certain time (10 years in

[1] The difference between the three and a quarter million dollars actually borrowed and the three and one-half million dollars of the certificates issued is explained by the fact that certificates amounting to 250/3500 of the equitable ownership were held by the Trustee in trust for the other holders until November 1, 1940, which the Company might redeem for $250,000.00 provided it could procure a conveyance of fee simple titles to the Trustee to the two parcels originally acquired by it under lease.

the Neighbors case and 5 years here) at $1,000.00 plus a premium, graduated according to the time the certificates were purchased.

But there is an important additional feature here which was not present in the Neighbors case. There, as we have noted, the taxpayer had the right to buy up the certificates, but no sinking fund to amortize the indebtedness was set up. Here there was established a Depreciation Fund (really an amortization fund not to be confused with the depreciation on buildings for which the deduction was claimed) payable at a rate, not less than $16,250.00 a quarter in cash or certificates, sufficient to amortize the indebtedness in 48½ years, but limited to a total accumulation of $2,600,000.00 to conform to a ruling of the Attorney General for the State of Ohio. At the date of the hearing before the Board the Company had already acquired in open market sufficient certificates to pay sinking fund requirements for the next sixteen years.

Aside from the deed in fee simple from respondent to the Bank as Trustee, there was no evidence that the transaction was intended as an absolute sale. Neither Fred Lazarus, Jr., Vice-President of the Company, nor Lowry Sweeney, Manager of the Bank's bond department, considered that the Bank was purchasing the property. Lazarus testified that he would not have sold property, valued in excess of six million dollars, to the Bank for approximately three and a quarter million dollars, and Sweeney said that he "considered we were doing a financing job for the F. & R. Lazarus & Company." The Company did a gross business of twelve million dollars annually. It set up on its books charges of $375,000.00 annually to rental, over twice what it paid as interest on the certificates, and in line with six and a half million dollars' appraisal which had been placed on the properties.

All of these facts: The long life of the Company; the fact that it had constructed the buildings to suit its own needs and was expanding its business in other communities; that it was setting out to liquidate the indebtedness through the Depreciation Fund and thus reacquire title to the properties; in addition to the authority of the Neighbors case, to which we adhere, support our conclusion that no absolute conveyance was intended and that the Company did not lose its right to make deductions for exhaustion of property conveyed.

The decision of the Board of Tax Appeals is affirmed.

We are not unmindful of the contrary holding in City National Bank Building Co. v. Helvering, 98 Fed. (2d) 216 (C. A. for D. C.). In that case the court was unable to follow our opinion in the Neighbors case largely because it arrived at a different conclusion as to the effect to be attributed to the case of Senior v. Braden, 295 U. S. 422.

No. 7687. For the year ending January 31, 1930, the Company made the following contributions, to:

Columbus Community Fund	$18,000.00
Salvation Army	1,000.00
White Cross Hospital	1,000.00

and for the year ending January 31, 1931, to:

Columbus Community Fund	$18,168.67
Salvation Army	1,000.00

The Company sought to deduct these amounts from its return for those years as ordinary and necessary business expenses. Rev. Act 1928, Ch. 852, 45 Stat. 791, Sec. 23 (a). Its claim was founded on the fact that business houses were solicited on the basis of a showing of actual benefits received by their employees from the fund. Lazarus, who was one of the founders of the fund, and active in its work, testified: "Ten dollars per employee was considered the amount that should be paid under normal business conditions. * * *"

The evidence is that the population of Columbus was approximately 300,000. The Company employed from 1,400 to 1,600 people and claimed that 20 to 25% of that number were in active contact with the social and health activities of the Community Fund. The only definite figures came from a survey of 199 employees of the Company made in 1928. Of these "35 of the persons on the list, either personally or through their immediate families, had received help from the welfare agencies," exclusive of the hospitals and character-building and recreational organizations which the survey did not cover. However, Fred C. Croxton, Community Fund director in 1928, stated that the facilities and services of the Community Fund were open to all citizens of Columbus and that no particular preference was given employees of the Company.

Aside from the direct benefit to its employees, resulting from these contributions, the Company claimed that since it was the largest retail department store in the community, it was of fundamental importance to its business to participate in the activities which made Columbus a better city and increased the opportunities for business; and that its contributions, which were large and which always received favorable publicity, were important to it from the standpoint of the goodwill of its customers, many of whom, Lazarus testified, were deeply interested in the subject of social service.

Prior to the Revenue Act of 1935, only individuals, not corporations, were permitted to take deductions for charitable and other contributions. Rev. Act 1928, Ch. 852, 45 Stat. 791, Sec. 23 (n) (2). But Article 262, Treas. Reg. 74, promulgated under that Act, provided in part—

"Donations by corporations.—Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and necessary business expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income."

Contributions, such as these, to be deductible as ordinary and necessary business expense, must result in direct benefit to the employees of the Company or their dependents; and whether they benefited directly from the Company's contributions to the Community Fund is a question of fact. Old Mission Portland Cement Co. v. Helvering, Commr., 293 U. S. 289, 294.

The only nonconjectural evidence on the subject was derived from a sampling of the Company's employees in 1928, when thirty-five out of the one hundred and ninety-nine questioned, or members of their families, were helped by agencies participating in the Fund. This was less than 20% of the [illegible]milies represented by the Company's 1,600 employees. Assuming t[illegible]were five persons in each family helped, this would aggregate only 1,500 to 1,600 people of the 300,000 in Columbus, or about one-half of one percent. Such aid to its employees is indirect and entirely too remote [Morgan Constr. Co. v. U. S., 18 Fed. (2d) 892 (D. C.)] and was not the easily traceable benefit sanctioned by us in American Rolling Mill Co. v. Commr., 41 Fed. (2d) 314, where the taxpayer employed half of the wage earners of the city and contributed over one-third of the civic improvement fund. See also Corning Glass Works v. Lucas, 37 Fed. (2d) 798 (C. of A.—D. C.). In Old Mission Portland Cement Co. v. Helvering, Commr., supra, the same contention was made as here, that the gifts resulted in goodwill to the taxpayer, but the Supreme Court there said that there must be evidence of direct benefit to the taxpayer's business.

In Helvering v. Evening Star Newspaper Co., 78 Fed. (2d) 604 (C. C. A. 4), the taxpayer was a newspaper which gave ardent support to the cause of the Community Chest and sought to deduct its contributions thereto on the ground that its prestige was thereby enhanced and that it would have suffered had it not contributed in a liberal manner. The court said, at page 605—

"Whether the contributions resulted in an increase in the circulation or advertising of the Star, and if any, to what extent, is of necessity mere conjecture. The evidence falls far short of establishing either proposition. If any benefit, in either respect, did accrue, it is so indirect and remote that it cannot rise to the dignity of being substantial, nor warrant a finding that the donations involved were, in a general sense, necessary and ordinary expenses within the meaning of section 23 of the Revenue Act of 1928 * * * or of the Treasury Regulations 74 * * *."

The same reasoning applies here. There is no showing of direct and tangible benefits to the Company or of new business secured thereby as in the contribution to the Y. M. C. A. in Old Mission Portland Cement Co. v. Commr., 69 Fed. (2d) 676 (C. C. A. 9), and no showing of existing contracts retained as in Fairmont Creamery Corp. v. Helvering, 89 Fed. (2d) 810 (C. C. A. of D. C.). The Company insisted that its patronage would have been hurt if the contribution had not been made and conceivably this would have been true bu

evidence of damages was remote. The question is one of fact and we find no evidence to upset the finding of the Board. Its decision is therefore affirmed.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of Commissioner of Internal Revenue vs. The F. & R. Lazarus & Company, No. 7686, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 28th day of April, A. D. 1939.

[SEAL]

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1939

183 Supreme Court of the United States.

Order allowing certiorari

Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration and decision of this application.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43,453. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 56. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. The F. & R. Lazarus & Company. Petition for a writ of certiorari and exhibit thereto. Filed May 16, 1939. Term No. 56 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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No. [redacted] 56

In the Supreme Court of the United States

OCTOBER TERM, 1938

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE F. & R. LAZARUS & COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	8
Reasons for granting the writ	9
Conclusion	11

CITATIONS

Cases:	
City Nat. Bank Bldg. Co. v. *Helvering*, 98 F. (2d) 216	9, 10
Commissioner v. *H. F. Neighbors Realty Co.*, 81 F. (2d) 173	10, 11
Senior v. *Braden*, 295 U. S. 422	10, 11
Statute:	
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23	2

146149—39

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE F. & R. LAZARUS & COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above cause on February 16, 1939, affirming the decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals[1] (R. 24–33) is reported in 32 B. T. A. 633.

[1] The opinion of the Board covers two cases, Docket Nos. 69481 and 69750, which were consolidated for hearing and report. (R. 24.) Both the Government (in No. 7686) and

The opinion of the Circuit Court of Appeals (R. 173–179) is reported in 101 F. (2d) 728.

JURISDICTION

The decree of the Circuit Court of Appeals was entered February 16, 1939. (R. 173.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer conveyed certain real property, and made an assignment of long term leases on other property, receiving in return, in addition to a cash consideration, a 99-year lease upon the premises conveyed, with options of renewal and purchase. Should this transaction be treated as a mortgage to secure a loan or a sale in determining whether the taxpayer is entitled to deduct depreciation for the taxable years involved on the buildings occupied by it under the 99-year lease.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *

---

the taxpayer (in No. 7687) filed petitions for review and the cases, by stipulation of the parties, were consolidated for briefing and argument before the court below, which in turn covered both cases in one opinion. (R. 173.) Only the judgment in No. 7686 is covered by this petition.

(k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

STATEMENT

The facts, pertinent herein, as found by the Board of Tax Appeals (R. 25, 26–28), are as follows:

Taxpayer, an Ohio corporation organized in 1851, operates a department store in Columbus, Ohio. In 1928 it was conducting its business in three buildings which it had previously constructed at an aggregate cost of $2,467,952.57. Two of the buildings were erected on ground then owned by the taxpayer in fee, and the third building, erected in 1921 at a cost of $258,054.71, was constructed on ground held by the taxpayer under a 99-year lease with option to purchase, acquired in 1915. It also held another

parcel of ground under a 99-year lease with option to purchase. (R. 25.)

In 1928, the taxpayer had a mortgage of $1,700,000 outstanding on the property it owned in fee and owed slightly more than $1,500,000 for money borrowed on short-term notes, and sought means of spreading the obligations over a longer period of time. The only avenue open to it was the equities it had in its real property. A banking house in Chicago, the holder of taxpayer's short-term notes, suggested a loan of $3,750,000 for 25 years at 5 per centum interest secured by a mortgage on taxpayer's real property, conditional upon the purchase of the notes at 97.25 and the creation of a sinking fund, which, with interest on the loan and trustee expenses, would have involved an outlay of $210,000 per year. The Huntington National Bank of Columbus, one of taxpayer's bankers for about 15 years, suggested a loan of $3,500,000 at 5 per centum based upon the issuance of land trust certificates on taxpayer's real property at a price of 96.75, and the creation of a sinking fund for repayment of the loan. The proposal of the Huntington National Bank of Columbus, limited to $3,250,000 in amount, was accepted by the taxpayer because the loan to be made under it was self-liquidating. (R. 26.)

The transaction was closed in this manner: The taxpayer executed and delivered to the Huntington National Bank of Columbus, trustee, a deed to

the parcels of property it held in fee and assignments of the 99-year leases it held for the remaining property, and concurrently therewith the trustee leased the property to the taxpayer for a term of 99 years, with an option of renewal for like terms and to purchase at specified prices, and executed a declaration of trust between itself and holders of the land trust certificates relating to the issuance of 3,500 certificates, each of the face amount of $1,000. Of the 3,500 certificates, 250 were held in reserve pending the exercise of the option to purchase the parcels covered by the 99-year leases assigned to the trustee by the taxpayer. The sum of $3,159,687.50 ($3,250,000 less discount of 3.25 per centum) was received by the taxpayer from the Huntington National Bank of Columbus under the transaction. This sum was used by the taxpayer to take up its mortgage on the property and short-term notes. The release of the mortgage, the deed to the trustee, and the declaration of trust were recorded consecutively on June 28, 1928. (R. 27.)

The lease from the trustee to the taxpayer provides, among other things, for annual rentals during the term of the lease based upon an annual return of 5 per centum on $3,250,000, that the lessee shall create a depreciation fund and make quarterly payments to the trustee for deposit therein until the fund reaches the sum of $2,600,000, and that such obligation may be satisfied by the deliv-

ery of cash, land trust certificates issued under the declaration of trust, or obligations of the United States; that the lessor shall pay interest on the amounts deposited in such fund, provided that any amounts may be, at the request of the taxpayer, invested in obligations of the United States or certificates issued by the trustee under its declaration of trust; that the lessee shall have the option to purchase the lessor's interest in the property for $3,605,000 between June 1, 1933, and May 31, 1938; for $3,570,000 between June 1, 1938, and May 1, 1948; for $3,535,000 after June 1, 1948, plus, in each case, accrued rentals to the date of purchase; that in case the option to purchase is exercised there shall be credited on the purchase price (1) all amounts then in the hands of the lessor as trustee not otherwise due for distribution under the terms of the trust agreement with the certificate holders, (2) any amounts in the hands of the lessor received as compensation for the appropriation to public use of any part of the premises, (3) the amount of cash in the depreciation fund, including the net proceeds of any securities other than land trust certificates, and the option price of any land trust certificates held in the depreciation fund, and (4) the net unappropriated proceeds of any insurance; that the lessee shall pay all taxes and other charges on the depreciation fund; that in case the lessee fails to exercise the option to purchase or the lease is terminated on account of

default of the lessee, the depreciation fund shall become the property of the lessor as liquidated damages on account of depreciation in value of the premises; that in case of condemnation of a substantial portion of the premises the lessee shall exercise the option given it to purchase; that there shall be no diminution of rent in case of condemnation or loss by fire of any portion of the premises; and that the lessee shall pay all taxes and insurance on the property and keep it in good condition, order, and repair. (R. 27–28.)

The land trust certificates were sold to the public at $1,010 to yield a return of 4.95 per centum. The certificates recite, among other things not important here, that the holder is the owner of a portion, stated in 3,500ths, "of the equitable and beneficial interest" in the real property under lease to the taxpayer; that the trustee will account to the registered owner of the certificate quarterly for the owner's proportionate share of the trust estate or the net proceeds thereof; and that the certificate is subject to all of the terms of the declaration of trust under which it was issued. (R. 28.)

The declaration of trust executed by the trustee, in addition to the terms of the certificates as set forth in the preceding paragraph, recites the terms of the option to purchase given the taxpayer under the lease; that the certificates are subject to call at prices ranging from $1,010 to $1,030, depending upon the period during which the right is exer-

cised, plus an adjustment for accrued rentals; that in the event the property is sold distribution of the net proceeds shall be made among the holders of the certificates; that the duties of the trustee shall be restricted to the collection of rent from the trust estate and the distribution of the net proceeds thereof to the certificate holders; and that the holders of the certificates shall have no right to call for a partition of the trust estate. (R. 28.)

In its return for the taxable years here involved, taxpayer claimed depreciation on the three buildings based upon a useful life of 40 years. The Commissioner disallowed the claimed deductions on the ground that the right to take depreciation on the property follows the legal title thereto. The Board of Tax Appeals, however, held that the deed given was in reality a mortgage and that the transaction was not one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed (R. 29–30). The Circuit Court of Appeals affirmed (R. 173).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding:

1. That, under the facts herein, the taxpayer in 1928 in reality accomplished a mortgage of its real property to secure a loan and not a sale thereof.

2. That the taxpayer did not effect a sale of its property in the year 1928, and that no absolute conveyance to the trustee was intended.

3. That the transaction in 1928 was not one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed.

4. That the taxpayer-corporation was entitled to deductions for depreciation in each of the taxable fiscal years ending January 31, 1930 and 1931 on its property to which it had previously had title but which it occupied during the taxable years in question as lessee under the 99-year leases.

5. That the decision of the Board of Tax Appeals should be affirmed, and in failing to order that judgment be entered for the Commissioner of Internal Revenue.

REASONS FOR GRANTING THE WRIT

The decision below, allowing the taxpayer to deduct for depreciation upon the building which it holds under the 99-year lease, is squarely in conflict with the decision of the Court of Appeals for the District of Columbia in *City National Bank Bldg. Co.* v. *Helvering*, 98 F. (2d) 216.

In the latter case the taxpayer, like the taxpayer here, had once owned a building and the land upon which it was situated, for which it had paid $1,525,000. In 1925 the taxpayer conveyed the property in fee to an Ohio bank, receiving in exchange $930,000 in cash and a valuable lease on the property for 99 years, renewable forever, with an exclusive option to repurchase. The Ohio bank contemporaneously declared a trust of the property,

as the Huntington National Bank did here, for the holders of 1,000 shares of the equitable ownership in fee. These so-called "land trust certificates" were sold to the public. The rental under the lease was precisely the amount necessary to pay the interest on these certificates. The court held that the taxpayer's claimed deduction for depreciation was correctly disallowed.

That decision, as the court below recognizes (R. 176), is squarely in conflict with the decision below. Indeed, the *City National Bank* case was in itself in conflict with a prior decision of the court below in *Commissioner* v. *H. F. Neighbors Realty Co.*, 81 F. (2d) 173, which was followed in the instant case.

The court in the *City National Bank* case stated that it was unable to follow the decision in the *Neighbors* case largely because it arrived at a different conclusion as to the effect to be attributed to the decision of this Court in *Senior* v. *Braden*, 295 U. S. 422. In that case the question involved was whether Ohio "land trust certificates", such as those involved in these cases, represented equitable interests in land, or were choses in action, for purposes of taxation by Ohio of intangible property. The Court held that the certificates represented interests in land and were consequently not taxable. The Court of Appeals for the District of Columbia pointed out that since that decision had established that the certificates represented an interest in land,

the conveyance to the trustee was a sale, and not a mortgage. As an additional reason for disallowing the claimed deduction, which is equally applicable in the present case, the court pointed out that the taxpayer had no capital investment in the property, since it had received back its whole original investment.

The court below, notwithstanding these lines of reasoning, adhered to its former decision in the *Neighbors* case. There is thus presented a clear-cut conflict both as to the effect to be attributed to the decision in *Senior* v. *Braden, supra,* and ultimately, as to the propriety of deductions for depreciation by the lessee in transactions of this character. That conflict should be resolved by this Court.

CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

MAY 1939.

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No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE F. & R. LAZARUS & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	9
Summary of argument	10
Argument:	
I. The transaction effected a sale of the property	11
1. The transaction in terms effected a sale and not a mortgage	12
2. The transaction should be construed according to its terms	18
3. The rights of the certificate holders are inconsistent with the construction of the transaction as creating a mortgage	21
II. The taxpayer has no investment in the depreciable property	24
Conclusion	26

CITATIONS

Cases:	
American National Bank v. *Groft*, 56 S. D. 460	15
Arizona Copper Estate v. *Watts*, 237 Fed. 585	14
Atlantic Coast Line R. Co. v. *Commissioner*, 81 F. (2d) 309, certiorari denied, 298 U. S. 656	11, 25
Bank v. *Logue, Trustee*, 89 Ohio St. 288	16
Biggs v. *Bickel*, 12 Ohio St. 49	16
Bogardus v. *Commissioner*, 302 U. S. 34	12
Bolton v. *Bank*, 50 Ohio St. 290	15
Campbell v. *Northwest Eckington Co.*, 229 U. S. 561	21
City National Bank Bldg. Co. v. *Helvering*, 98 F. (2d) 216	16, 23
Conway v. *Alexander*, 7 Cranch. 218	14, 15, 20
Duffy v. *Central R. Co. of New Jersey*, 268 U. S. 55	24
Embola v. *Tuppela*, 127 Wash. 285	14
Ensel v. *Levy & Bro.*, 46 Ohio St. 255	23
First National Bank v. *Rawson*, 56 Ohio App. 388	15
Gibson v. *Kraay*, 3 Ohio L. R. 671, affirming 2 Ohio N. P. (n. s.) 437	14, 15, 16
Grand Union Co., In re, 219 Fed. 353	14

Cases—Continued. Page

Helvering v. *Rankin*, 295 U. S. 123 12
Helvering v. *Tex-Penn Co.*, 300 U. S. 481 12
Horbach v. *Hill*, 112 U. S. 144 ..... 14, 15
Hume v. *Dixon*, 37 Ohio St. 66 23
Kirtland v. *Hotchkiss*, 100 U. S. 491 ..... 17, 18, 22
Lessee of Avery v. *Dufrees*, 9 Ohio 145 16
Lomond Co. v. *McNabb*, 109 W. Va. 142, 153 S. E. 905 ..... 15, 23
McCammon v. *Cooper*, 69 Ohio St. 366 16
Narragansett Mut. Fire Ins. Co. v. *Burnham*, 51 R. I. 371 16
National Department Stores v. *Board of Equalization*, 111 W. Va. 203 17
New York Central Railroad Co. v. *Commissioner*, 79 F. (2d) 247, certiorari denied, 296 U. S. 653 ..... 11, 25
Nitkey v. *Ward*, 199 Minn. 334 ..... 16, 23
Pattrick v. *Littell*, 36 Ohio St. 79 22
Senior v. *Braden*, 295 U. S. 422 17
Slutz & Larue v. *Desenberg*, 28 Ohio St. 371 ..... 14, 21
Smith, Administrator v. *Loewenstein*, 50 Ohio St. 346 ..... 14, 16
Standard Sanitary Mfg. Co. v. *George*, 118 Ohio St. 564 23
Stollenwerck v. *Marks & Gayle*, 188 Ala. 587, 65 So. 1024 14
Wallace v. *Johnstone*, 129 U. S. 58 ..... 14, 20, 21
Weiss v. *Wiener*, 279 U. S. 333 ..... 11, 24
West v. *Hendrix*, 28 Ala. 226 22
The Westover, In re, 82 F. (2d) 177 23
Wiener v. *Weiss*, 27 F. (2d) 200; 279 U. S. 333 ..... 24, 25
Wilson v. *Hicks*, 40 Ohio St. 418 23

Statute:

Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 23 2
Sec. 113 3
Sec. 114 3

Miscellaneous:

Goldman and Abbott, *Land Trust Certificates with Relation to Ohio Law* (1928), 2 Cinn. L. Rev. 255 15
XI Ohio Bar (May 23, 1938), p. 125 15
1 Jones on Mortgages (7th ed.):
Sec. 70 14
Sec. 265 14
Sec. 267 14
Sec. 268 14
Sec. 270 14
4 Kent Commentaries 153 14
L. R. A. 1916 B, Sec. 107, p. 186 22
48 L. R. A. (n. s.) 745 23
Ohio Gen. Code (Throckmorton, 1926):
Sec. 710-140 (d) 14
Sec. 5325 ..... 16, 22
Ops. of the Atty. Gen. (Ohio, 1926):
No. 3640, pp. 375, at 376 ..... 16, 19
No. 3869, p. 528 19

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 56

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE F. & R. LAZARUS & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–24) is reported in 32 B. T. A. 633. The opinion of the Circuit Court of Appeals (R. 127–133) is reported in 101 F. (2d) 728.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 16, 1939 (R. 127). The petition for a writ of certiorari was filed May 16, 1939, and granted October 9, 1939. The jurisdiction of this Court rests upon Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer conveyed certain real property, and made an assignment of long-term leases on other property, receiving in return, in addition to a cash consideration, a 99-year lease upon the premises conveyed, with options of renewal and purchase. Should this transaction be treated as a mortgage to secure a loan or as a sale in determining whether the taxpayer is entitled to deductions for depreciation on the buildings occupied by it under the 99-year lease?

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the

trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property.

* * * * *

STATEMENT.

The pertinent facts, as found by the Board of ax Appeals (R. 17-21), and as summarized by the ircuit Court of Appeals (R. 127-130), are as llows:

The taxpayer, an Ohio corporation organized in 51, operates a department store in Columbus, Ohio . 17, 128). In 1928 it was conducting its busiss in three buildings which it had previously con-

structed at an aggregate cost of $2,467,952.57. Two of the buildings were erected on ground then owned by the taxpayer in fee, and the third building, erected in 1921 at a cost of $258,054.71, was constructed on ground held by the taxpayer under a 99-year lease with option to purchase, acquired in 1915. It also held another parcel of ground under a 99-year lease with option to purchase (R. 17, 128).

In 1928 the taxpayer had a mortgage of $1,700,000 outstanding on the property it owned in fee and owed slightly more than $1,500,000 on short-term notes, and it sought means of spreading the obligations over a longer period of time. The only avenue open to it was through the equities it had in its real property (R. 18, 128). A banking house in Chicago, the holder of taxpayer's short-term notes, suggested a loan of $3,750,000 for 25 years at 5 percent interest, secured by a mortgage on taxpayer's real property, conditional upon the purchase of the notes at 97.25 and the creation of a sinking fund, which, with interest on the loan and trustee expenses, would have involved an outlay of $210,000 per year (R. 18–19, 128). The Huntington National Bank of Columbus, one of taxpayer's bankers, suggested a loan of $3,500,000 at 5 percent, based upon the issuance of land-trust certificates. This proposal was accepted by the taxpayer, but was limited to $3,250,000 in amount (R. 19, 128).

The transaction was closed in this manner: The taxpayer executed and delivered to the Hunting-

ton National Bank, trustee, a deed to the property it held in fee and assignments of the 99-year leases it held for the remaining property, and concurrently the trustee leased the property to the taxpayer for a term of 99 years, with options of renewal for like terms and of purchase at specified prices (R. 19, 128). At the same time the Bank executed a declaration of trust stating that it held the property for the use and benefit of all present and future holders of the land trust certificates (R. 19, 129). The sum of $3,159,687.50 ($3,250,000 less discount of 3.25 percent) was received by the taxpayer from the Bank under the transaction. This sum was used by the taxpayer to take up its mortgage on the property and short-term notes. (R. 19, 128). The release of the mortgage, the deed to the trustee, and the declaration of trust were recorded consecutively on June 28, 1928 (R. 19).

The lease from the trustee to the taxpayer states that the Bank is trustee for those who might be or become the owners of land trust certificates and provides for annual rentals during the term of the lease based upon an annual return of 5 per centum on $3,250,000 (R. 19; Ex. 6, pp. 51, 54–55). It also provides, among other things, that the lessee shall create a depreciation fund and make quarterly payments to the trustee for deposit until the fund reaches the sum of $2,600,000, and that such obligation may be satisfied by the delivery of cash, land trust certificates issued under the declaration of

trust, or obligations of the United States; that the lessor shall pay interest on the amounts deposited in such fund, provided that any amounts may be, at the request of the taxpayer, invested in obligations of the United States or certificates issued by the trustee under its declaration of trust; that the lessee shall have the option to purchase the lessor's interest in the property for $3,605,000 between June 1, 1933, and May 31, 1938; for $3,570,000 between June 1, 1938, and May 1, 1948; for $3,535,000 after June 1, 1948, plus, in each case, accrued rentals to the date of purchase; that in case the option to purchase is exercised there shall be credited on the purchase price (1) all amounts then in the hands of the lessor as trustee not otherwise due for distribution under the terms of the trust agreement with the certificate holders, (2) any amounts in the hands of the lessor received as compensation for the appropriation to public use of any part of the premises, (3) the amount of cash in the depreciation fund, including the net proceeds of any securities other than land trust certificates, and the option price of any land trust certificates held in the depreciation fund, and (4) the net unappropriated proceeds of any insurance; that the lessee shall pay all taxes and other charges on the depreciation fund; that in case the lessee fails to exercise the option to purchase or the lease is terminated on account of default of the lessee, the depreciation fund shall become the prop-

erty of the lessor as liquidated damages for depreciation in value of the premises; that in case of condemnation of a substantial portion of the premises the lessee shall exercise the option given it to purchase; that there shall be no diminution of rent in case of condemnation or loss by fire of any portion of the premises; and that the lessee shall pay all taxes and insurance on the property and keep it in good condition, order, and repair (R. 19–20, 129–130; Ex. 6, pp. 51–94).

The lessee, while not in default, and upon giving proper security, may remove and replace the buildings by paying all costs of the new buildings which are to become a part of the realty (Ex. 6, pp. 72–78, 82–83). In case of default the lessor has the right to declare the term of the lease ended, to reenter the premises, buildings, and improvements, and "again to repossess and enjoy as of the Lessor's first and former estate, free of any right or claim on the part of the Lessee," and the lessee is to "surrender said premises, together with the buildings, improvements, and fixtures then thereon" (Ex. 6, p. 83). The lessor has a first lien on the leasehold estate for amounts due under the lease (Ex. 6, p. 85).

The land trust certificates were sold by the Bank to the public at $1,010, to yield a return of 4.95 per centum (R. 20, 128–129). Each certificate recites, among other things, that the holder is the owner of a fraction, stated in 3500ths, "of the equitable ownership and beneficial interest" in the real property

under lease to the taxpayer; that the trustee will account to the registered owner of the certificate for the owner's proportionate share of the trust estate or the net proceeds; and that the certificate is subject to all of the terms of the declaration of trust under which it was issued (R. 20; Ex. 7, pp. 99–103).

The declaration of trust executed by the trustee, in addition to the terms of the certificates as set forth in the preceding paragraph, recites the provisions of the lease to the taxpayer, and provides that the certificates are subject to call at prices varying from $1,010 to $1,030, depending upon the period during which the right is exercised, plus an adjustment for accrued rentals; and that as the property is sold, a distribution of the net proceeds shall be made among the holders of the certificates (R. 20, 129; Ex. 7). The agreement also provides that no beneficiary as such shall have any legal title to the trust property, his interest being equitable only, and shall have no right to call for partition of the trust estate during the continuance of the trust; and that the duties of the trustee shall be restricted to the collection of rent from the trust estate and the distribution of the net proceeds to the certificate holders (R. 20; Ex. 7, pp. 111–113).

The transaction was carried out by the issuance of the land trust certificates rather than by a mortgage loan because local taxation of mortgage bonds made them unmarketable (R. 21, 128; 33–34; 36; 37). A ruling of the Attorney General of Ohio as to what securities were nontaxable similarly ac-

counts for the limitation of the depreciation fund, provided in the lease, to a total of $2,600,000 (R. 21, 130; 34; 38).

The taxpayer at the time of this transaction considered that the property conveyed was worth about $6,000,000 and would not have sold it for $3,250,000 (R. 20, 130; 35). The rent paid by the taxpayer under the lease, however, was less than a fair rental, and the petitioner recognized this by making a rent charge of $375,000 each year in its books (R. 21, 130; 31; 35).

In its returns for the taxable years here involved, the taxpayer claimed deductions from gross income for depreciation on the buildings occupied by it under the lease, based upon a useful life of 40 years (R. 6). The Commissioner disallowed the claimed deductions on the ground that the taxpayer no longer owned the property but was a lessee (R. 9). The Board of Tax Appeals concluded that the deed given by the taxpayer was "in reality a mortgage" and that the transaction was not one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed (R. 21). The decision of the Board was affirmed by the Circuit Court of Appeals (R. 130).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding—

1. That, under the facts herein, the taxpayer in 1928 in reality accomplished a mortgage of its real property to secure a loan and not a sale thereof.

2. That the taxpayer did not effect a sale of its property in the year 1928, and that no absolute conveyance to the trustee was intended.

3. That the transaction in 1928 was not one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed.

4. That the taxpayer-corporation was entitled to deductions for depreciation in each of the taxable fiscal years ending January 31, 1930 and 1931, on property to which it had previously had title but which it occupied during the taxable years in question as lessee under the 99-year leases.

5. That the decision of the Board of Tax Appeals should be affirmed, and in failing to order that judgment be entered for the Commissioner of Internal Revenue.

SUMMARY OF ARGUMENT

The transaction in question provided in terms for an outright sale of the property in consideration for cash and a long-term lease, renewable forever. No debt arose as a result of the transaction, and, accordingly, there is no basis for construing the conveyance as a mortgage. The certificates issued to the public in connection with the transaction are a well-known type of investment and are not in any sense mortgage bonds, notes, or other evidences of indebtedness. On the contrary, the certificate holders have interests in the land itself which are inconsistent with a mortgage relationship between the parties.

The evidence introduced by the taxpayer does not support the conclusion that the terms of the transaction should be disregarded and the conveyance construed in equity to be a mortgage. In any event, the certificate holders may not be prejudiced by any undisclosed understanding between the other parties to the transaction. Accordingly, the taxpayer cannot exercise the rights of a mortgagor and should in this controversy be regarded merely as a lessee.

The taxpayer as lessee has no investment in the property which would support an allowance for depreciation. *Weiss* v. *Wiener*, 279 U. S. 333; *New York Central Railroad Co.* v. *Commissioner*, 79 F. (2d) 247 (C. C. A. 2d), certiorari denied, 296 U. S. 653; *Atlantic Coast Line R. Co.* v. *Commissioner*, 81 F. (2d) 309 (C. C. A. 4th), certiorari denied, 298 U. S. 656.

ARGUMENT

I

THE TRANSACTION EFFECTED A SALE OF THE PROPERTY

The transaction involved in the present case purported on its face to transfer the legal title of the property to the trustee and the equitable ownership to the holders of the land trust certificates in consideration for the transfer to the taxpayer of the sum of $3,159,687.50 and the rights given under the long-term lease. The Board of Tax Appeals concluded from a consideration of all the evidence

that the transaction did not result in a sale of the property and that the deed of absolute conveyance "was in reality a mortgage" (R. 21). In its brief in opposition in this Court (Br. 5–6), the taxpayer contended that the Board thus made a finding of fact which was conclusive if supported by substantial evidence. But clearly the conclusion reached by the Board is not a finding of an evidentiary fact. It is an ultimate finding which involves a "conclusion of law or at least a determination of a mixed question of law and fact." It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491; *Bogardus* v. *Commissioner*, 302 U. S. 34, 39; *Helvering* v. *Rankin*, 295 U. S. 123, 131. The considerations properly applicable in determining the effect of the transaction here involved show that the conveyance was not a mortgage and that the taxpayer undertook no obligation for the return of the money it received.

1. The transaction in terms effected a sale and not a mortgage

Under the terms of the instruments evidencing the rights and obligations of the parties to the transaction here involved the taxpayer neither extended an existing indebtedness nor incurred a new one. There is no provision in any of the instruments which obligates the taxpayer absolutely to

repay the sum of $3,159,687.50 received by it through the sale of the land trust certificates. The certificates in question, unlike bonds or notes, are not evidences of indebtedness: they bear no maturity date; they are not in any stated amount; they contain no promise to pay. On the contrary, each certificate states on its face that the holder is the owner of a specified fraction "of the equitable ownership and beneficial interest" in the property covered by the lease (R. 20; Ex. 7, p. 100). While the lease gives it an option to repurchase the property after five years, the taxpayer is not obligated to do so. If the taxpayer chooses, it may renew the lease and continue as lessee forever (R. 92–93).[1] If its interests suggest a different course it may allow the lease to expire at the end of the first 99-year term. In either event the certificate holders cannot force the taxpayer to repurchase the property and retire the certificates. They will continue to be investors in the property held for their benefit by the trustee.

The option here given to the taxpayer to choose whether or not it will repay the certificate holders takes this case outside the typical security transaction evidenced by a mortgage. "To constitute a mortgage, there must necessarily be a debt which

[1] The option to purchase apparently must be exercised prior to the expiration of the first 99-year term (R. 59, 93). It is optional with the taxpayer to refrain from purchasing except in the unlikely contingency that a substantial portion of the premises is taken by condemnation (R. 61).

is the subject of the security."[2] In this connection the term "debt" refers to a subsisting obligation to pay, enforceable by an action in favor of the mortgagee.[3] The courts which have considered the question hold that such a subsisting, enforceable obligation is an indispensable attribute of a mortgage. See *Conway* v. *Alexander,* 7 Cranch 218, 236; *Horbach* v. *Hill,* 112 U. S. 144, 148; *Wallace* v. *Johnstone,* 129 U. S. 58, 64; *Slutz & Larue* v. *Desenberg,* 28 Ohio St. 371; *Gibson* v. *Kraay,* 3 Ohio L. R. 671, affirming, 2 Ohio N. P. (n. s.) 537.[4] In this case an obligation to pay the certificate holders will arise only after the taxpayer has exercised its option to repurchase the property. The existence of such an option clearly does not create a subsisting enforceable debt.[5] It is in no way inconsistent with an outright conveyance: *Wallace* v. *Johnstone,* 129 U. S. 58, 64. On the contrary, such an option has been included in innumerable conveyances which have not been regarded as mortgages. See *Slutz & Larue* v. *Desenberg,* 28 Ohio St.

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[2] 1 Jones on Mortgages (7th Ed.), § 70. See 4 Kent Comm. 153.

[3] 1 Jones on Mortgages (7th ed.), §§ 265, 267, and cases cited.

[4] See *Arizona Copper Estate* v. *Watts,* 237 Fed. 585 (C. C. A. 9th); *Stollenwerck* v. *Marks & Gayle,* 188 Ala. 587. See also Jones on Mortgages (7th ed.), §§ 265, 267, and cases cited.

[5] See *Smith, Administrator* v. *Loewenstein,* 50 Ohio St. 346, 356; *In re Grand Union Co.,* 219 Fed. 353, 356 (C. C. A. 2d); *Embola* v. *Tuppela,* 127 Wash. 285.

371; *Gibson* v. *Kraay*, 3 Ohio L. R. 671; *American National Bank* v. *Groft*, 56 S. D. 460; *Lomond Co.* v. *McNabb*, 109 W. Va. 142, 153.[6] Since the taxpayer is not under an unconditional obligation to pay the certificate holders here, the principles generally accepted in the decisions compel a holding that the transaction here did not in terms create a mortgage on the premises.

Land trust certificates of the kind issued in connection with the transaction involved in the present case have received considerable favor, especially in Ohio, as a new type of investment.[7] The nature of the interests created by such a transaction, accordingly, has been litigated before the courts on several occasions. These decisions establish the existence of rights in the holders of the certificates which are incompatible with the existence of the rights asserted by the taxpayer here. For purposes of inheritance, a certificate is regarded in Ohio as an undivided equitable interest in real estate so as to make the primary quality ownership as distinguished from a security merely incident to a debt *First National Bank* v. *Rawson*, 56 Ohio

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[6] See *Conway* v. *Alexander*, 7 Cranch 218; *Horbach* v. *H* , 112 U. S. 144. See also cases cited in Jones on Mort- ges (7th ed.) §§ 268, 270.

[7] See Goldman and Abbott, Land Trust Certificates with Relation to Ohio Law (1928), 2 Cinn. L. Rev. 255; XI Ohio Bar (May 23, 1938), p. 125; Ohio Gen. Code (Throckmorton, 1926), § 710-140 (d).

App. 388.* The Ohio courts have likewise held that a land trust certificate is not taxable as personal property (*Gibson* v. *Kraay*, 3 Ohio L. R. 671), and a similar decision was rendered in 1926 by the Attorney General. Ops. of the Atty. Gen. (Ohio, 1926) No. 3640, p. 375. These latter rulings are significant in view of the statutory provision imposing a personal property tax on "money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties thereto it is considered as security merely." Ohio Gen. Code (Throckmorton, 1926) § 5325. Since the substance rather than the form of the transaction was the basis of taxation, the trust certificates could have been held nontaxable only upon the ground that the lessee did not have the rights and obligations of a mortgagor. These rulings of the Attorney General and the courts of Ohio are also supported by the considered judgments of the courts of several other jurisdictions. In all of them the land trust certificates were treated as equitable interests in land and not as securities issued in a mortgage transaction. *Nitkey* v. *Ward*, 199 Minn. 334; *Narragansett Mut.*

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* An equitable interest in land has many of the incidents of legal title. See *Lessee of Avery* v. *Dufrees*, 9 Ohio 145; *Biggs* v. *Bickel*, 12 Ohio St. 49; *Bolton* v. *Bank*, 50 Ohio St. 290; *Bank* v. *Logue, Trustee*, 89 Ohio St. 288. The certificate appears to be a device for splitting up the interest in land known as the "ground rent." See *Smith, Administrator* v. *Loewenstein*, 50 Ohio St. 346; *McCammon* v. *Cooper*, 69 Ohio St. 366.

Fire Ins. Co. v. *Burnham,* 51 R. I. 371; *National Department Stores* v. *Board of Equalization,* 111 W. Va. 203; *City National Bank Bldg. Co.* v. *Helvering,* 98 F. (2d) 216 (App. D. C.).

Moreover, the decision of this Court in *Senior* v. *Braden,* 295 U. S. 422, clearly establishes that a transaction in which land trust certificates are issued does not in terms create a security relationship between the parties. The record in that case shows that the provisions in some of the leases and trusts were in all substantial respects the same as the provisions in the instruments evidencing the transaction involved here. Yet the majority of the Court was clearly of the opinion that the transaction there constituted a sale and not a loan or mortgage. There was no mention in the majority opinion of *Kirtland* v. *Hotchkiss,* 100 U. S. 491, and no indication that the Court intended to overrule the doctrine it established that a state may tax a resident creditor on a debt secured by a mortgage on land in another state. In short, the decision stands for the proposition that the purchaser of a certificate acquires an outright interest in the land itself and not a security interest incident to a loan of money.

The opinion of the minority in no way conflicts with the position asserted by the Commissioner in this case. Quite the contrary. The analysis of the incidents of ownership of a certificate holder set forth in the minority opinion clearly differentiates

the certificates from mortgage bonds. If the minority had regarded the transaction as creating a mortgage, it could have rested its opinion solely upon *Kirtland* v. *Hotchkiss*, 100 U. S. 491. Thus it must be regarded as settled that the transaction involved in the present case in terms effected a sale of the property to the trustee for the benefit of the certificate holders.

2. The transaction should be construed according to its terms

The immediate parties to the instruments evidencing this transaction were well aware that the rights and obligations for which they bargained were not the same as those arising from a transaction of a loan secured by mortgage. The testimony of three of the witnesses for the taxpayer establishes beyond doubt that the form adopted was consciously chosen because mortgage bonds were subject to taxation and hence were unmarketable (R. 33–34; 36; 37). Two years before the instruments were executed the Attorney General of Ohio had ruled that a land trust certificate need not be listed by the holder for personal property taxation because "it is not in any sense a mortgage, a leasehold bond or note, but is an evidence of actual ownership in whatever property may be trusteed as a basis for the issuance of any particular series or designation of certificates. The certificate is merely an evidence of the holder's simple individual share

in the ownership of large parcels of property."[9] There can be no doubt from the evidence that the taxpayer and the trustee consciously sought to bring the transaction here involved within the terms of that ruling (R. 34; 37, 38). The trustee would not have entered the transaction had an issue of mortgage bonds been contemplated (R. 37).

Despite such unequivocal evidence the Board of Tax Appeals concluded that "the deed given was in reality a mortgage." The testimony upon which the Board relied does not support such a conclusion. The treasurer of the taxpayer testified that it "would not have sold those properties to the bank or anyone else at that time for approximately three and a quarter million dollars" (R. 35). The representative of the Bank testified: "In closing the land trust certificate transaction I did not consider the Huntington National Bank was purchasing the properties from petitioner; I considered we were doing a financing job for The F. and R. Lazarus Company financing" (R. 38).[10] The credibility of this testimony may be conceded without in any way detracting from the contention of the Commissioner that this transaction did not create a mortgage.[11]

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[9] Ops. of the Atty. Gen. (Ohio, 1926) No. 3640, p. 375, at 376; see also *id.* No. 3869, p. 528.

[10] The Board also relied upon testimony that the Bank required the value of the property to be greater than the amount of money transferred to the taxpayer (R. 38).

[11] This testimony should also be evaluated in the light of certain resolutions of the stockholders and directors of the taxpayer indicating that, at the time, it considered that it

The consideration for this sale was not limited to cash slightly in excess of three million dollars. In addition, the taxpayer as lessee received the right to occupy the premises at a rental which the record indicates is much below the fair value, and the right to repurchase the property at its option (R. 21, 130; 31; 35). There is no basis here arising from inadequacy of consideration for overturning the very carefully chosen terms of the bargain and finding an absolute promise by the taxpayer to redeem when such a promise was not inserted in terms and not desired by either the trustee or the certificate holders. See *Conway* v. *Alexander*, 7 Cranch 218, 236; *Wallace* v. *Johnstone*, 129 U. S. 58, 64. The Bank naturally did not intend to purchase the property for its own account. That is far different from a conclusion that the certificate holders did not purchase the property but merely advanced money as a loan to be secured by a mortgage. The taxpayer and the trustee both contemplated that the money would be raised through the sale of these certificates to the public. They consciously adopted a form which at the time and place was recognized by the investing public as having incidents quite distinct from a security

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was selling, not mortgaging, its property: On June 27, 1928, the stockholders consented "to the sale of the real estate above mentioned" (R. 120). On the same day, the Board of Directors authorized the president and secretary "to sell" the property (R. 121); and at a special meeting the following day the transaction was described as a "sale of the Lazarus properties" (R. 123).

transaction. In view of these facts, the equivocal testimony introduced by the taxpayer cannot be considered sufficient to support the ultimate conclusion of the Board ignoring the terms of the documents evidencing the transaction.

The cases cited by the Board of Tax Appeals (R. 18) for the proposition that a deed, absolute in form, will be treated by a court of equity as a mortgage if it is executed as security for a loan do not support its conclusion in the present situation. The evidence introduced by the taxpayer here does not approach the clearness and certainty required by the decisions either of this Court or the courts of Ohio. See *Campbell* v. *Northwest Eckington Co.*, 229 U. S. 561, 584; *Wallace* v. *Johnstone*, 129 U. S. 58, 64; *Slutz & Larue* v. *Desenberg*, 28 Ohio St. 371.

3. The rights of the certificate holders are inconsistent with the construction of the transaction as creating a mortgage

The intention of the taxpayer and the trustee, even if it was to create a mortgage as security for a loan, cannot be considered as determinative of the rights of the holders of the land trust certificates. The transaction on its face purported to be a sale of the property to the trustee for the benefit of the certificate holders. None of the holders was informed of the existence of a tacit understanding on the part of the taxpayer and the trustee, if there was any, to treat the transaction as a loan

secured by a mortgage. On the contrary, the prospectus informed them that "in the opinion of counsel these certificates represent interests in real property located in Ohio, the taxes on which are paid by the lessee, and therefore are not required to be listed in any State for Personal Property Tax" (R. 38; Ex. 8, facing p. 118).[12]

The cases cited in the Board of Tax Appeals (R. 18) and in the brief in opposition (Br. 5) present the simple situation of a transaction involving two parties both of whom intend that the conveyance in question should be security for a debt. Clearly they do not touch a situation where, as here, the parties advancing the money never regarded it as a loan and were never given notice that the grantor so regarded it. It has been established that the intention of the parties to treat an outright conveyance as a mortgage must be *mutual*. *West* v. *Hendrix*, 28 Ala. 226, 234–235; *Nitkey* v. *Ward*, 199 Minn. 334.[13] In the present case the form of instrument adopted by the taxpayer and the trustee amounted to a representation, apart from the statement in the prospectus, that the certificates were not taxable in Ohio. Yet if the claim of the taxpayer be accepted here, it knew at the time that facts existed which would change the transaction

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[12] Such an opinion could not have been rendered in good faith had the issuer known of facts which turned the transaction into a loan secured by a mortgage. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; Ohio Gen. Code (Throckmorton, 1926) § 5325, *Pattrick* v. *Littell*, 36 Ohio St. 79 (1880).

[13] See also L. R. A. 1916 B, Sec. 107, p. 186.

into a loan secured by a mortgage and render the certificates taxable. No equity exists in favor of a grantor which has misled the other party in interest in such fashion. *Nitkey* v. *Ward*, 199 Minn. 334; *City Nat. Bank Bldg. Co.* v. *Helvering*, 98 F. (2d) 216, 222 (App. D. C.).[14] The situation presented here is similar to that which came before the Circuit Court of Appeals for the Second Circuit in *In re The Westover*, 82 F. (2d) 177. There an assignment of a mortgage, in form absolute, was claimed by the grantor to have been merely a pledge of the mortgage to secure a debt. Certain undivided shares in the mortgage, however, had been assigned by means of certificates sold to the public. The court there held that the certificates must be construed according to their terms and that the grantor was estopped from relying upon any undisclosed understanding with the grantee to the detriment of the certificate holders. In order to protect their tax immunity the certificate holders here, by parity of reasoning, could insist that the taxpayer be not regarded as a mortgagor. Since the taxpayer could not exercise the rights of a mortgagor clearly there exists no reasons for holding that it occupies such a position for the purposes of this tax controversy.

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[14] See *Hume* v. *Dixon*, 37 Ohio St. 66; *Wilson* v. *Hicks*, 40 Ohio St. 418; *Ensel* v. *Levy & Bro.*, 46 Ohio St. 253; *Standard Sanitary Mfg. Co.* v. *George*, 118 Ohio St. 564, 573; *Lomond Co.* v. *McNabb*, 109 W. Va. 142. See also 48 L. R. A. (n. s.) 745.

II

THE TAXPAYER HAS NO INVESTMENT IN THE DEPRECIABLE PROPERTY

Since the taxpayer must be regarded as a lessee and not as a mortgagor, the existence of a present separate investment in the depreciable property must be established as the basis for a depreciation allowance. *Weiss* v. *Wiener*, 279 U. S. 333; *Duffy* v. *Central R. Co. of New Jersey*, 268 U. S. 55.

The original investment of the taxpayer in the premises has been returned to it in the form of cash in excess of three million dollars and valuable rights acquired under the lease. It has made no additional investment in the premises since acquiring them as lessee. Accordingly, it has no investment in any particular property on the premises and cannot definitely establish that the wasting of a particular asset, for example a building, represents a current loss to it. *Weiss* v. *Wiener*, 279 U. S. 333.

The situation before this Court in *Weiss* v. *Wiener*, 279 U. S. 333, was in all essentials the same as that presented here. The taxpayer was the lessee under thirteen 99-year leases, renewable forever, upon real estate in Ohio. Several of the leases required the lessee to maintain on the premises buildings of a value not less than a stated amount, to keep the buildings in "like condition as the same now are in," and in case of their removal or destruction from any cause to replace them with new buildings of a value equal to or in

excess of the value of the existing buildings. The taxpayer sought an allowance for depreciation on the buildings which were conceded to have a useful life much shorter than the terms of the leases. *Wiener* v. *Weiss*, 27 F. (2d) 200. This Court pointed out (p. 336) that the capital of the lessee was not currently being consumed and concluded that it was not enough that the taxpayer might have to replace the capital at some future time. See *New York Central Railroad Co.* v. *Commissioner*, 79 F. (2d) 247 (C. C. A. 2d), certiorari denied, 296 U. S. 653; *Atlantic Coast Line R. Co.* v. *Commissioner*, 81 F. (2d) 309 (C. C. A. 4th), certiorari denied, 298 U. S. 656, 691.

The payments into the so-called depreciation fund provided in the lease in no way aid the taxpayer here. The fund draws interest and remains the property of the taxpayer, subject to the terms of the lease (R. 56–57, 58). It may never pass to the lessor as damages for the depreciation of the property. On the contrary, it will be credited to the taxpayer as part of the purchase price in the event it exercises its option to retake the property (R. 59–60). Taxpayer will likewise receive credit for the fund if it sells its rights under the lease. The retention of these incidents of ownership is inconsistent with a claim that taxpayer is incurring a present loss. Certainly the payments do not show the existence of a present depreciating investment in the buildings.

CONCLUSION

The taxpayer sold its premises to the trustee for the benefit of the land-trust certificate holders and now occupies the property as lessee. Accordingly, it has no depreciable interest in the buildings acquired from the lessor and occupied under the terms of the lease. The judgment of the Circuit Court of Appeals should, therefore, be reversed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
ELLIS N. SLACK,
Special Assistants to the Attorney General.

EDWIN E. HUDDLESON, JR.,
Special Attorney.

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OCTOBER TERM, 1938

No. 968 56

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

THE F. AND R. LAZARUS AND COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
Attorneys for Respondent.

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INDEX

	PAGE
Introduction	1
Statement	2
Argument:	
I. Even if certiorari were granted, this Court would be bound to affirm the judgment of the Circuit Court of Appeals for the Sixth Circuit, as the finding of the Board of Tax Appeals in this case, supported as it is by substantial evidence, is conclusive	5
II. The asserted conflict between City National Bank Building Company v. Helvering, 98 Fed. (2d) 216, and the decision below arises from differences of fact, and not in the application of any principle of law	6
Conclusion	8

CITATIONS

Cases:	
City National Bank Building Co. v. *Helvering*, 98 F. (2d) 216	2, 6, 7
Coleman v. *Miller*, 8 Oh. (Reprint) 179	5
Colorado Bank v. *Commissioner*, 305 U. S. 23	6
Commissioner v. *Neighbors Realty Co.*, 81 F. (2d) 173	6, 7
Cotterell v. *Long*, 20 Oh. 464	5
Duffy v. *Central R. Co. of N. J.*, 268 U. S. 55	5
Helmbold v. *Helmbold*, 25 Oh. App. 32	5
Johnson v. *Commissioner*, 88 F. (2d) 952	6
Marshall v. *Stewart*, 17 Oh. 356	5
Peugh v. *Davis*, 96 U. S. 332	5
Russell v. *Southard*, 12 How. 139	5
Wisconsin Electric Co. v. *Dumore Co.*, 282 U. S. 813	8
Miscellaneous:	
I. T. 2679 (XII-1 Cum. Bull. p. 103)	7

Supreme Court of the United States

OCTOBER TERM, 1938

No. 968

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

THE F. AND R. LAZARUS AND COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTION

References to the opinions below, the jurisdiction and the statute involved are set forth in the petition for writ of certiorari filed herein by petitioner (pages 1-3).

The Board of Tax Appeals found that it was not the intention of the taxpayer to make a sale, but that the transaction leading to the issuance of the land trust certificates was one of loan and that the conveyance was by way of

security. Therefore, the taxpayer remained the substantial owner of the property and was entitled to charge a fair depreciation on the improvements used in its business. We submit that this conclusion of the Board of Tax Appeals, supported as it is by substantial evidence, is binding on the courts. As to alleged conflict between the decision below and that of the Court of Appeals of the District of Columbia in *City National Bank Building Co.* v. *Helvering*, 98 F. (2d) 216, as will be shown later, there are such important differences of fact in these two cases, that they are not necessarily in conflict.

STATEMENT

The petitioner has set forth in his brief (pages 3-8, inclusive) the substantial facts, as set forth in the opinion of the Board of Tax Appeals, except that petitioner's brief omits the facts found on page 29 of the record, as follows:

> "From the undisputed testimony in the record it is clear that the petitioner's desire was to obtain a long-term loan on the security of its real property, with provision for reacquisition of unencumbered title. It was not interested in selling the property to raise the needed funds. The petitioner then considered the property conveyed to be worth around $6,000,000 and it would not have sold it for $3,250,000, the face amount of the trust certificates actually sold. The representative of the bank in the transaction testified that he did not consider that the bank was buying the property, and that the deal was merely one involving a loan with ample security. The bank had the property appraised to determine not whether the property was worth $3,250,000 to it as a buyer, but to establish the value of the land and improvements for loan purposes. The appraisal made by qualified appraisers established a value of $3,453,125 for the land and $3,056,427 for the improvements as of the time of the transaction.

"The transaction was carried out in the form described instead of by a mortgage loan because of the lack of a market at that time for mortgage notes. The annual rentals were fixed on the basis of a 5 per cent return on the face amount of the outstanding certificates, an amount established by evidence to be less than a fair rental. This the petitioner recognized by making a rent charge of $375,000 on its books each year for the property.* The option price of the property held in fee was fixed at an amount equal to the call price of the outstanding certificates and the amount of the quarterly payments into the depreciation fund is sufficient to retire all of the certificates within 48½ years at the call prices thereof. Up to this time the petitioner has been able to meet the requirements of the fund with certificates purchased in the open market at less than the call prices and now has on hand certificates of a face amount sufficient to meet its depreciation fund obligations for sixteen years. The petitioner desired to have the lease provide for a depreciation fund equal to the option price of the property, but it was limited to $2,600,000 in the lease in order to bring the transaction within a certain ruling of the Attorney General of Ohio.

"From a consideration of all the evidence we conclude that the deed given was in reality a mortgage, and that the transaction was not one in which the petitioner lost its right to deductions for exhaustion of the property conveyed."

Mr. Fred Lazarus, Jr., testified that he handled the finances of The F. & R. Lazarus & Company and had done so for twenty-seven years. He handled its financing in 1928, the year in which the transaction involved occurred. In that year the company had completed an addition to their Columbus building at a cost of $2,000,000, for which they had borrowed $1,700,000 on a ten (10) year mortgage at five per cent (5%) interest in 1926 from the North-

*The actual rental payable to the Trustee for land trust certificate holders was $162,500 a year, 5% of $3,250,000. (R. 27)

western Mutual Life Insurance Company (R. 45). In June, 1928, they purchased the controlling stock of The John Shillito Company (of Cincinnati) for slightly more than $500,000. This was financed by issuing short term notes that were sold to A. G. Becker & Company, an investment and banking house of Chicago, payable in six (6) months (R. 45). He said they had two propositions for long term financing, one from Becker for a bond issue and one from the Huntington National Bank of Columbus for a land trust certificate issue. They accepted the Huntington proposition because it was self-liquidating and the other proposition was not self-liquidating (R. 46). Under the Huntington proposition with the repayment of a fixed annual rental plus one-half of one per cent (½%) annually to the sinking fund, the principal of the loan would be liquidated in 48½ years. The representative of the Huntington National Bank, who was the manager of its bond department, had prepared a schedule showing how the liquidation would occur. This is attached to the narrative statement of evidence as "Petitioner's Exhibit No. 3" (R. 46 and 62).

Mr. Lazarus further testified that in June, 1928, he thought the land and buildings of The F. & R. Lazarus & Company in Columbus, which were made subject to the land trust certificate issue, were worth $6,000,000. He would not have sold the properties to the bank or anyone else at that time for approximately $3,250,000 (R. 48). These properties were appraised by three qualified appraisers as worth $6,509,552, as of June 13, 1928 (Testimony of Converse, R. 43; of Beggs, R. 53 bot.; of Vercoe, R. 55; Petitioner's Exhibit No. 1, R. 60).

On the basis of the testimony as found by the Board of Tax Appeals, it concluded that The F. & R. Lazarus & Company was entitled to take depreciation over a useful life of the buildings of fifty (50) years.

ARGUMENT

I.

Even if certiorari were granted, this Court would be bound to affirm the judgment of the Circuit Court of Appeals for the Sixth Circuit, as the finding of the Board of Tax Appeals in this case, supported as it is by substantial evidence, is conclusive

The question before the Board of Tax Appeals was whether the conveyance by respondent to the Huntington National Bank of Columbus, as Trustee, and the taking of the perpetual lease back, was in substance a conveyance away of respondent's interest, or was in substance and in equity a security transaction analogous to a mortgage. On this question of fact the finding of the Board of Tax Appeals was in favor of the respondent (R. 29-30).

In Ohio, where land is conveyed by an absolute deed and the vendee at the same time delivers to the vendor a contract by which he agrees to convey the premises by a specified time, upon the payment of the purchase money with interest, there is a presumption that the deed was intended as a mortgage and it will be so held in equity. *William Marshall* v. *Charles Stewart et al.*, 17 Oh. 356. See, also, *Coleman* v. *Miller*, 8 Oh. (Reprint) 179; *Cotterell* v. *Long*, 20 Oh. 464; *Helmbold* v. *Helmbold*, 25 Oh. App. 32.

This Court has held that an absolute conveyance, for the loan of money, may be shown to be and treated in equity as a mortgage. *Peugh* v. *Davis*, 96 U. S. 332. See, also, *Russell* v. *Southard*, 12 How. 139.

It is not necessary that the taxpayer be the holder of the legal title to property in order to be entitled to take depreciation as a deduction in its income tax return. *Duffy* v. *Central R. Co. of N. J.*, 268 U. S. 55, at page 64.

The intention of the parties in a transaction is a question of fact and the finding of the Board of Tax Appeals

thereon is conclusive on the Courts. *Colorado Bank* v. *Commissioner*, 305 U. S. 23.

Even where the evidence is undisputed, if different inferences might reasonably be drawn therefrom, the judgment of the Board of Tax Appeals will not be disturbed. *Johnson* v. *Commissioner*, 8 Cir., 88 F. (2d) 952.

II.

The asserted conflict between City National Bank Building Co. v. Helvering, 98 F. (2d) 216, and the decision below arises from differences of fact, and not in the application of any principle of law.

In the instant case, the taxpayer had constructed all the improvements in question before the transaction which gave rise to the question presented occurred. There was no change in operation or in the practical incidents of ownership from the day before the transaction occurred to the day after it occurred.

In the *City National Bank Building Co.* case the corporation involved had never had legal title to the property but was organized for the purpose of taking the leasehold, so that the land trust certificates and leasehold bonds might be issued. It was a transaction devised and entered into solely for the purpose of issuing securities. The Board of Tax Appeals, in deciding the *City National Bank Building Co.* case, after referring to its decision in the instant case and the decision of the Sixth Circuit Court of Appeals in *Commissioner* v. *Neighbors Realty Co.*, 6 Cir., 81 F. (2d) 173, stated: (34 B. T. A. 93, at page 99).

> "The facts in the present case are different in some respects from the facts in the *Lazarus* and *Neighbors* cases. It may be that these differences serve to distinguish the cases. The transactions in the *Lazarus* and *Neighbors* cases were initiated by existing corporations in order to refinance their indebtedness. Here

the transactions were initiated by bankers who desired some business."

The *Neighbors Realty Co.* case was one in which the Court held, following the Board of Tax Appeals, that no gain or loss resulted from the conveyance of the company's property to a trustee and the taking of a perpetual lease back, for the purpose of issuing land trust certificates, on the ground that the transaction was one for security only and the corporation was still the substantial owner of the property. This was in accordance with the ruling of a previous Commissioner in I. T. 2679 (Internal Revenue Cumulative Bulletin, XII-1, p. 103). It followed as a corollary that the corporation could take depreciation on the improvements on the property as a deduction in connection with its income tax return.

There are other important differences between the instant case and the *City National Bank Building Co.* case, in that there was a depreciation fund provided for (really an amortization fund) which was not provided for in the City National Bank Building Company lease. These differences, while not referred to as such, are set out in the following language of the Court of Appeals in the instant case, in 101 F. (2d), at page 730 (R. 176), as follows:

> "Here there was established a Depreciation Fund (really an amortization fund not to be confused with the depreciation on buildings for which the deduction was claimed) payable at a rate not less than $16,250.00 a quarter in cash or certificates, sufficient to amortize the indebtedness in 48½ years, but limited to a total accumulation of $2,600,000 to conform to a ruling of the Attorney General for the State of Ohio. At the date of the hearing before the Board the company had already acquired in open market sufficient certificates to pay sinking fund requirements for the next 16 years. . . .

"All of these facts: the long life of the Company; the fact that it had constructed the buildings to suit its own needs and was expanding its business in other communities; that it was setting out to liquidate the indebtedness through the Depreciation Fund and thus re-acquire title to the property; in addition to the authority of the Neighbors' case, to which we adhere, support our conclusion that no absolute conveyance was intended and that the Company did not lose its right to make deductions for exhaustion of property conveyed."

When it appears that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, a writ of certiorari has been dismissed as improvidently granted. *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U. S. 813.

CONCLUSION

As there is here a finding of fact sustained by substantial evidence and as the alleged conflict of decisions is really one of fact rather than of law, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
Attorneys for Respondent.

June 5, 1939.

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No. 56

IN THE

Supreme Court of the United States

October Term, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

THE F. & R. LAZARUS & COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
Counsel for Respondent.

PAXTON & SEASONGOOD,
HARRY STICKNEY,
Of Counsel.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
1. Findings of Board of Tax Appeals not in Petitioner's Brief	3
2. Evidence in Support of Findings of Board	5
Summary of argument	13
Argument:	
I. The findings and decision of the Board of Tax Appeals in this case, supported as they are by substantial evidence, and affirmed by the Circuit Court of Appeals are conclusive	15
A. This Court does not substitute its conclusions as to facts for that of the Board	18
II. The taxpayer need not have the legal title in order to be entitled to an allowance for depreciation	19
III. The transaction whereby taxpayer conveyed its property to the bank as trustee and leased it back was in substance an encumbrance of its property for a loan and not a sale	22
A. The substance of the transaction may be shown by oral testimony in circumstances outside of the written instrument of conveyance	22
B. A conveyance of real estate although absolute in form, if intended by the parties to be security for a loan is, in fact, a mortgage	22
C. It is a question of proof whether or not a conveyance was, in fact, given as security for a loan	23

PAGE

IV. There is no estoppel against the taxpayer in this case 25

A. Estoppel was neither pleaded nor proved before the Board of Tax Appeals and should not, therefore, be considered by this Court 25

B. The Petitioner cannot set up an estoppel because no representation was made to him or anyone in privity with him by the taxpayer 25

C. The doctrine of estoppel could not apply here because the bank, which made the loan to the taxpayer, was fully advised as to all the circumstances 26

V. The taxpayer has not recovered its investment in its business property and, therefore, is entitled to continue to take depreciation on its buildings as it did before the land trust certificate transaction took place 28

VI. Cases cited by Commissioner's Counsel distinguished 31

Conclusion 35

Appendix 37

CITATIONS

Cases:

American National Bank v. Groft, 56 S. D. 460 31

Bailey v. Poe, 142 Md. 57 23

Bogardus v. Commissioner, 302 U. S. 34 18

Branson v. Wirth, 17 Wall. 32 25

Brant v. Virginia Coal & Iron Co., 93 U. S. 326 26

Brick v. Brick, 98 U. S. 514 22

Burroughs Adding Machine Co. v. Bogdon, 9 F. (2d) 54 20, 30

City National Bank Building Co. v. Helvering, 98 F. (2d) 216, affirming 34 B. T. A. 93 32

Cogar v. Commissioner, 44 F. (2d) 554 19

Coleman v. Miller, 9 Ohio Dec. Repr. 179 23

Colorado Bank v. Commissioner, 305 U. S. 23 15

PAGE

Commissioner v. The Hub, Inc., 68 F. (2d) 349 . . . 30
Commissioner v. H. F. Neighbors Realty Co., 81 F. (2d) 173 . . . 20, 23, 27, 28, 35
Conway v. Alexander, 7 Cranch 218 . . . 24, 31
Cotterell v. Long, 20 Ohio 464 . . . 23
Deery v. Cray, 5 Wall. 795 . . . 25
Diebold, E. M. v. Commissioner, 19 B. T. A. 438 . . . 30
Duffy v. Central R. Co. of New Jersey, 268 U. S. 55 . . . 19
Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353 . . . 22
Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37 . . . 18
Euclid Doan Co., In re, 104 F. (2d) 712 . . . 16, 26
First National Bank in Wichita v. Commissioner, 57 F. (2d) 7, certiorari denied, 287 U. S. 636 . . . 23
General Utilities & Operating Co. v. Helvering, 296 U. S. 200 . . . 25
Gibson v. Kraay, 3 O. L. R. 671, affirming 2 O. N. P. (N.S.) 537 . . . 31
Gladding Dry Goods Co., 2 B. T. A. 336 . . . 19
Helmbold v. Helmbold, 25 Ohio App. 32 . . . 23
Helvering v. National Grocery Co., 304 U. S. 282 . . . 18
Helvering v. Rankin, 295 U. S. 123 . . . 18
Helvering v. Salvage, 297 U. S. 106 . . . 25
Helvering v. Tex-Penn Co., 300 U. S. 481 . . . 18
Hotel Gibson Co., In re, S. D. Ohio, 11 F. Supp. 30 . . . 27
Hughes v. Edwards, 9 Wheaton 489 . . . 22
Hulburd v. Commissioner, 296 U. S. 300 . . . 18
Kitzmiller v. VanRennselaer, 10 O. S. 63 . . . 25
Kraemer v. Adelsberger, 122 N. Y. 467 . . . 22
Lomond Co. v. McNabb, 109 W. Va. 142 . . . 31
Marshall v. Stewart, 17 Ohio 356 . . . 23
Morris v. Nixon, 1 Howard 118 . . . 22
Narragansett Mutual Fire Ins. Co. v. Burnham, 51 R. I. 371 . . . 34
National Stores v. Board of Equalization, 111 W. Va. 203 . . . 34

PAGE

Nitkey v. Ward, 199 Minn. 334 31
Nugent v. Riley, 1 Metcalf (42 Mass.) 117 23
Obrecht v. Friese, 148 Md. 484 23
Peoples Street Railway Co. v. Spencer, 156 Pa. 85 23
Peugh v. Davis, 96 U. S. 332 22
Pig and Whistle Co. v. Commissioner, 9 B. T. A. 668 30
Reich v. Cochran, 151 N. Y. 122 23
Russell v. Southard, 12 Howard 139 ..... 22, 24
Senior v. Braden, 295 U. S. 422, reversing 128 O. S. 597 ..... 34, 35
Slutz and Larue v. Desenberg, 28 O. S. 371 ..... 25, 31
Sycamore Hammond Realty Co., In re (unreported), No. 13031, D. C. S. D. Ohio, W. Div. 27
Taft, Robert A. v. Commissioner, 27 B. T. A. 808 30
Teal v. Walker, 111 U. S. 242 22
United National Corp. v. Commissioner, 33 B. T. A. 790 22
United States v. Shelby Iron Co., 273 U. S. 571 22
Wallace v. Johnstone, 129 U. S. 58 35
Ward v. Ward, 131 Fed. 946, affirmed 145 F. 1023 26
Weiseham v. Hocker, 7 Okla. 250 22
Weiss v. Wiener, 279 U. S. 333 ..... 21, 33
Westover, Inc., In re, The, 82 F. (2d) 177 27
White v. Redenbaugh, 41 Ind. App. 580 22
Woodward v. Pickett, 8 Gray (74 Mass.) 617 22

Statutes and Rulings:

Bankruptcy Act, 48 Stat. 912, 11 U. S. C. A., Sec. 207 26
I. T. 2275, Internal Revenue Cumulative Bulletin V-1, p. 62 20
I. T. 2679, Internal Revenue Cumulative Bulletin XII-1, p. 103 ..... 23, 28
Revenue Act of 1928, C. 852—45 Stat. 791, Sec. 23 (k) 2, 19

PAGE

1926 Opinions Attorney General of Ohio, 375 26
Ohio General Code, Sec. 5370 (Page's Ann. Code, 1926 Ed.) 26
Ohio General Code, Sec. 5370 (114 O. L. 714, 734-735) 34

Miscellaneous:

Coke on Littleton, Sec. 352a 25
Goldman and Abbott, Land Trust Certificates (1928), 2 Cin. L. Rev. 255 26
52 Harvard L. Rev. 1153 27
16 Ruling Case Law 545 23
1 Jones on Mortgages, 8 Ed.
Sec. 317 23
Sec. 323 et seq. 16
79 A. L. R. 938 23

No. 56

IN THE

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16 to 24) nding in favor of the Respondent both on the facts and on ne law, is reported in 32 B. T. A. 633. The opinion of the ircuit Court of Appeals for the Sixth Circuit (R. 127 to 33), affirming the decision of the Board of Tax Appeals, reported in 101 F. (2d) 728.

JURISDICTION

The question of the jurisdiction of this Court is fully covered in the Brief for the Petitioner (pp. 1 and 2), to which reference is hereby made.

QUESTION PRESENTED

Whether this Court should reverse findings and decisions that a taxpayer operating a department store is entitled to deduct depreciation on buildings used by it in its business under the following circumstances: It erected the buildings for use in its business on land owned by it. Thereafter, pursuant to negotiations for the borrowing of money, it conveyed the land and buildings for half of their appraised value to a bank as trustee for land trust certificate holders. Its express purpose in making the conveyance was to finance a new loan to take up outstanding loans, the major part of which consisted of a construction loan for the erection of one of the buildings in question. At the same time it made the conveyance it received from the trustee a perpetual lease with privilege of purchase for substantially the same amount as it received from the trustee. The taxpayer continued to occupy the premises, to pay taxes, assessments and all expenses in connection with the property, the trustee's fees and sufficient addition to provide a fixed income based on approximately five per cent of the investment for land trust certificate holders. The lease required the taxpayer to pay into a so-called depreciation fund, for the benefit of the land trust certificate holders, up to eighty per cent of the amount advanced to the taxpayer, and permitted the payments to continue beyond that amount so that, as planned by the taxpayer and its banker, the entire issue would be retired within forty-five to forty-eight years. On the basis of this and other evidence supporting taxpayer's intention to borrow money rather than to sell real estate:

1. The Board of Tax Appeals found and decided that the transaction was in reality a mortgage, and was not one in which the taxpayer lost its right to deductions for exhaustion of the property conveyed, and that the property was being used in the business of the taxpayer;

2. Said findings were based on substantial evidence in the Record;

3. Said decision of the Board was affirmed by the Circuit Court of Appeals.

STATUTE INVOLVED

Section 23(k) of the Revenue Act of 1928 is set forth in Petitioner's Brief (p. 2) and in the Appendix to this Brief (p. 37).

STATEMENT

1. Findings of Board of Tax Appeals not in Petitioner's Brief.

Counsel for the Petitioner have given in their Brief (pp. 3 to 9, inclusive) portions only of the facts as set forth in the opinion of the Board of Tax Appeals. They have omitted certain significant parts thereof, as follows:

At the end of the paragraph at the top of page 4 of Petitioner's Brief, there is an omission of the following findings:

> "In 1928 the petitioner,[1] in a transaction involving the borrowing of money, gave to the Huntington National Bank of Columbus, trustee, a deed to the property it held in fee, and assignments of the property it held under ninety-nine year leases. Concurrently with such conveyance and assignments, the trustee leased all of the property to the petitioner for ninety-nine years, renewable for like periods, with an option to purchase the parcels to which it had title. . . . The petitioner insists that the deed was in reality a mortgage." (R. 17, 18.)

[1] Wherever "petitioner" appears in the quoted parts of the Board of Tax Appeals opinion, it refers to the taxpayer, respondent in this Court.

The last sentence of the long paragraph on page 4 of Petitioner's Brief reads in the Board of Tax Appeals opinion, instead of as set forth in Petitioner's Brief, as follows:

> "The Huntington National Bank of Columbus, one of petitioner's bankers for about 15 years, suggested a loan of $3,500,000.00 at 5 per cent based upon the issuance of land trust certificates on petitioner's real property at a price of 96.75, and the creation of a sinking fund for repayment of the loan. The proposal of the Huntington National Bank of Columbus, limited to $3,250,000.00 in amount, was accepted by the petitioner because the loan to be made under it was self-liquidating." (R. 19.)

There are also omitted from the opinion of the Board of Tax Appeals, as summarized in Petitioner's Brief, the following significant paragraphs (R. 20, 21):

> "From the undisputed testimony in the record it is clear that the petitioner's desire was to obtain a long-term loan on the security of its real property, with provision for reacquisition of unencumbered title. It was not interested in selling the property to raise the needed funds. The petitioner then considered the property conveyed to be worth around $6,000,000 and it would not have sold it for $3,250,000, the face amount of the trust certificates actually sold. The representative of the bank in the transaction testified that he did not consider that the bank was buying the property, and that the deal was merely one involving a loan with ample security. The bank had the property appraised to determine not whether the property was worth $3,250,000 to it as a buyer, but to establish the value of the land and improvements for loan purposes. The appraisal made by qualified appraisers established a value of $3,453,125 for the land and $3,056,427 for the improvements as of the time of the transaction.
>
> "The transaction was carried out in the form described instead of by a mortgage loan because of the lack of a market at that time for mortgage notes. The annual rentals were fixed on the basis of a 5 per cent return on the face amount of the outstanding cer-

tificates, an amount established by evidence to be less than a fair rental. This the petitioner recognized by making a rent charge of $375,000 on its books each year for the property. The option price of the property held in fee was fixed at an amount equal to the call price of the outstanding certificates and the amount of the quarterly payments into the depreciation fund is sufficient to retire all of the certificates within 48½ years at the call prices thereof. Up to this time the petitioner has been able to meet the requirements of the fund with certificates purchased in the open market at less than the call prices and now has on hand certificates of a face amount sufficient to meet its depreciation fund obligations for sixteen years. The petitioner desired to have the lease provide for a depreciation fund equal to the option price of the property, but it was limited to $2,600,000 in the lease in order to bring the transaction within a certain ruling of the Attorney General of Ohio.

"From a consideration of all the evidence we conclude that the deed given was in reality a mortgage, and that the transaction was not one in which the petitioner lost its right to deductions for exhaustion of the property conveyed."

2. Evidence in Support of Findings of Board.

The evidence in support of the findings of the Board of Tax Appeals is as follows:

The business of The F. & R. Lazarus & Company, which operates the largest department store in Columbus, Ohio, was founded in 1851 (R. 41). The present three buildings, on which depreciation is claimed, were built by taxpayer at different times for business purposes. The first building was started in 1908 and occupied in August, 1909 (R. 42). The cost of this building was $297,003.95 (R. 42). An addition was started in May, 1921, and occupied in that year and the following year. The cost was $258,054.71 (R. 42). A new building was started in 1925 and occupied in part through 1926 and 1927. The cost was $1,912,893.91 (R. 42). The aggregate cost of the three buildings is $2,467,952.57.

Each of these buildings was regularly used during each of the taxable years in the conduct of the taxpayer's business (R. 42). There was no demolition of any of these buildings (R. 42). All of the buildings were erected on ground owned in fee by the taxpayer, except the addition which was started in 1922, which was built on ground held by taxpayer under ninety-nine year lease acquired in 1915 (R. 42).

In the early part of 1928 taxpayer found itself in the following financial position. It had borrowed $1,700,000.00 on a ten-year mortgage at five per cent interest, in 1926, from The Northwestern Mutual Life Insurance Company (R. 32). This was used to aid in financing the construction of the latest improvement on taxpayer's property (R. 32). It had also purchased the controlling stock interest in The John Shillito Company of Cincinnati, at a cost of slightly more than a million and a half dollars. This sum had been borrowed on short term notes from A. G. Becker & Company of Chicago (R. 32). The minutes of the Board of Directors' meeting held on May 28, 1928, show the following:

> "The general finances of The F. & R. Lazarus & Company were discussed by the Secretary-Treasurer and it was recommended that an effort be made to cancel the present outstanding mortgage with the Northwestern Mutual Life Insurance Company, and to negotiate another and larger first mortgage for a period of not less than twenty-five years, or a so-called 'Fee Certificate' issue; either plan to provide an amount in excess of Three Million Dollars in order to cover the refunding of the Northwestern Mutual Life Insurance Company mortgage, and to provide most of the funds necessary for the acquisition of the Shillito interests and the surrounding property." (R. 33, Exhibit 2, R. 44.)

Fred Lazarus, Jr., the vice president and treasurer of taxpayer in charge of its finances (R. 32) asked the Huntington National Bank of Columbus and A. G. Becker &

Company of Chicago what means they could suggest for permanent or long term financing (R. 33). The only form this could take was on the security of the company's real estate (R. 33).

A. G. Becker & Company suggested a loan of $3,750,000.00 on the basis of a twenty-five year mortgage at five percent interest, the mortgage notes to be purchased at ninety-seven and a quarter. The sinking fund and trustee expense was to be $22,500.00 a year. Interest of $187,500.00 a year would have brought the annual charge up to $210,000.00 (R. 33).

The discussions at the Huntington Bank were with Mr. Gwynne Huntington, then vice president and later president, and with Mr. Lowry Sweney, the manager of the bond department (R. 33). They suggested a fee certificate issue or a so-called land trust issue, whereby they would advance taxpayer three and a half million dollars at five percent on repayment of a half of one percent a year of the principal and a trust fee of one-tenth of one percent. The price was to be ninety-six and three quarters or a discount of three and a quarter percent (R. 33). Only three and a quarter millions gross was finally taken (R. 35). The other two hundred fifty were held in reserve pending the exercise of the option to purchase the parcels covered by the ninety-nine year leases assigned to the trustee by the taxpayer (R. 35).

The proposition of the Huntington National Bank, though more expensive to the taxpayer than the Becker plan, was accepted because it was self-liquidating and the other was not (R. 33). Under the sinking fund arrangement of the Becker proposition taxpayer would have had to repay at the end of twenty-five years or refinance at that time an amount of between two and one-half and two and three-quarter million dollars. Under the Huntington Bank proposition the loan would be extinguished in forty-eight and one-half years (R. 33). As Mr. Lazarus stated,

if they financed under the Becker plan, necessitating refinancing after twenty-five years, "we believed we would be asking a new generation, probably, in management at that time, to take on certain burdens which we had caused the business by our own decisions" (R. 33). This they did not wish to do.

Before the deal was closed Mr. Sweney, the bond department manager of the Huntington National Bank, prepared a schedule of land trust retirement figures for Mr. Lazarus, showing their ultimate retirement in forty-eight and a half years (R. 33 and 39, Exhibit 3, R. 45). These figures were based on the required annual payments into the depreciation fund and purchase at the call prices of the land trust certificates (R. 38). If the land trust certificates could be purchased at less than the call prices, that would naturally reduce the period of retirement (R. 34). If the land trust certificates could be retired at par, it would take slightly less than forty-five years (R. 34). The taxpayer had at the time of hearing already acquired land trust certificates in the market without a premium and had on hand certificates that would pay requirements for the next sixteen years, which had cost the taxpayer less than par (R. 34). Taxpayer anticipated at the time the land trust certificates were issued and still anticipated at the time of hearing continuing the sinking or depreciation fund payments until all the land trust certificates were retired (R. 34). Mr. Lazarus wanted the payments into the so-called sinking or depreciation fund to be obligatory until all the land trust certificates were retired, but the bank would not consent to that because its counsel believed the certificates would not have been nontaxable under the Attorney General's opinion (1926 Opinions of Attorney General of Ohio, 375), and it was finally compromised so that the obligatory features of the depreciation fund would end when it had accumulated $2,600,000.00, but it was permissive for the

payments to continue until all the certificates were acquired (R. 34).

The land trust certificate issue was created in the following manner. The taxpayer deeded all of its real estate, on which its department store buildings were located, to the Huntington National Bank of Columbus, as trustee, (R. 42). Thereupon the Huntington National Bank, trustee, entered into an indenture of lease with the taxpayer (R. 34 and 42). Immediately thereafter the bank executed an Agreement and Declaration of Trust between itself as trustee and the holders of land trust certificates of equitable ownership in the Lazarus Store Building Site (R. 34 and 42). As a result of this transaction the taxpayer received from the bank the sum of $3,159,687.50 (R. 34 and 41). Of this amount $1,767,500.00 was paid to The Northwestern Mutual Life Insurance Company for the cancellation of its mortgage on the real estate, which still had almost eight years to run, and $1,543,750.00 was paid to A. G. Becker & Company for principal and interest on its notes (R. 41). That made an aggregate disbursement of $3,311,250.00, the difference ($151,562.50) between the proceeds of the land trust certificate issue ($3,159,687.50) and the outlay being withdrawn from current funds then in bank (R. 35 and 41).

The payment of the money and the delivery of the instruments referred to were simultaneous and they were recorded on the same date in rotation within a few minutes of each other (R. 42).

At the time that the Lazarus real estate and buildings were deeded to the Huntington National Bank for a net cash payment of less than $3,200,000.00, the same properties were appraised at $6,509,552.00 (R. 30, Exhibit 1, R. 30 and 43). The land was appraised at $3,453,125.00 and the buildings at $3,056,427.00 (Exhibit 1, R. 44). These values were fixed by disinterested men of wide experience, particularly in connection with the values of business property in the city of Columbus, and of excellent reputation

and standing in their profession (Testimony of Converse, R. 29; Beggs, R. 39; Vercoe, R. 40).

Taxpayer thought that the land and buildings were worth over $6,000,000.00 (R. 35). It would not have sold these properties to the bank or to anyone else at that time for three and a quarter million dollars (R. 35). It actually made a rent charge on its books of $375,000.00 a year as an operating expense of the business, though the rent paid under the lease was $162,500.00 (R. 35).

Before the transaction was closed the bank had had made the appraisal referred to (R. 38). When Mr. Sweney, the manager of the Huntington National Bank's bond department, who handled the transaction with Mr. Lazarus, was asked the purpose of the appraisal (R. 38), he said (R. 38), "We had to satisfy ourselves as to the value of the property; that there was a sufficient equity there to justify the loan." He also stated that it was the requirement of his bank that they would not finance any such property if the amount of the financing was more than sixty percent of the total value of the property, land and buildings, or more than the value of the land alone (R. 38). The land trust certificate issue was sold to the public for investment (R. 38). The bank's prospectus used and issued generally to the public in connection with the sale is in evidence, as Exhibit 8 (R. 38 and 159, following R. 118). This exhibit shows that the offering was confined to 3,250 out of the total of 3,500 units and that the price was to be $1,010.00 for each unit, to yield income at the rate of 4.95%. It also shows, under "Valuation," that the appraised value of the land and buildings was over $6,500,000.00 and who had made the appraisal. Under "Purchase Option—Depreciation Fund" it sets forth the provisions for the depreciation fund and the various privilege of purchase prices. Under "General Information" it says:

> "The proceeds of this financing which is the first that the company has ever done with the public are

largely being used for the acquisition of new properties."

Mr. Sweney testified that in closing the land trust certificate transaction with the taxpayer he did not consider that the Huntington National Bank was purchasing the properties from taxpayer but he considered that they were doing a financing job for it (R. 38). The Huntington Bank had been the bankers for taxpayer for several years (R. 36). There was no change in the operation of taxpayer's business or its method of conducting business between the time before the land trust certificate issue was made and afterward (R. 42).

The lessor did not attempt to take any depreciation on the buildings (R. 37).

The Indenture of Lease (R. 34, Exhibit 6, R. 51 to 95) refers at the outset to the Agreement and Declaration of Trust "to be recorded in the Recorder's Office of Franklin County, Ohio, following the recording of this Lease in said office" (R. 51). The lease is for ninety-nine years commencing June 1, 1928, and renewable forever on the same terms, except that there is a privilege of purchase only during the first term of ninety-nine years (R. 54 and 93). The privilege of purchase carries a three percent premium from June 1, 1933, to May 31, 1938, a two percent premium thereafter to May 31, 1948, and a one percent premium during the balance of the term (R. 59). Required annual payments into the depreciation fund were one-half of one percent of the maximum amount of land trust certificates at any time outstanding (R. 56). The payments into the fund and interest and income thereon were to accumulate until they reached the amount of $2,600,000.00 (R. 56). Any assignment of the lease would operate to transfer to the assignee all lessee's rights in the depreciation fund (R. 56). This fund could be invested only in United States government bonds

or in land trust certificates issued on the leased property (R. 57). Upon the exercise of the privilege of purchase the amount of land trust certificates in the depreciation fund was to be credited on the purchase price (R. 59). But if by the end of the first term the privilege of purchase had not been exercised or in case of the termination of the lease on account of the taxpayer's default, the fund was to become the absolute property of the lessor (R. 58). The lessee was to pay the taxes or other charges on the depreciation fund (R. 58).

It is provided that the lessee, on exercise of the privilege of purchase, is to get only the title the lessor had at the date of lease as to which the indenture recites the lessee is satisfied (R. 60). In case of condemnation of a substantial part of the demised premises the lessee agrees to exercise the option to purchase (R. 61). There is to be no diminution of rent because of any appropriation to public use of any part of the demised premises (R. 61). There is no diminution of rent in the event of the destruction of the buildings by fire or otherwise (R. 66).

There are no exceptions to the lessee's covenant to keep and maintain any and all buildings and improvements that may at any time during the term be or be erected or placed upon the demised premises, in a safe, tenantable and good condition, order and repair (R. 78). The lessee is to pay all taxes (R. 62) and insurance (R. 64). The lessee agrees not only to repair and replace, but also to reconstruct any improvements that suffer loss, damage or destruction (R. 66). If the proceeds of insurance are not sufficient to restore or rebuild the buildings on the premises, the lessee will furnish funds with which to repair or rebuild them (R. 68).

In case any building is torn down or removed by lessee the new buildings, together with the old ones remaining on the property, must have a reasonable cost and value to

aggregate not less than $3,500,000.00 and must be a business building, adapted to office, commercial or mercantile purposes (R. 73). The lessee is to bear the sole cost of erecting the buildings (R. 74). The covenant of quiet enjoyment is limited to a warranty against any person claiming through or under the lessor during the term of the lease (R. 80). The lessor is not to be liable under any expressed or implied covenants of title to the demised premises or any estate or interest therein, for any damage whatsoever to the lessee (R. 81).

The Agreement and Declaration of Trust (R. 34, Exhibit 7, R. 95 to 118) shows that the ordinary duties of the trustee are restricted to the collection of rent from the trust estate and the distribution of the net rentals to the land trust certificate holders (R. 111). The land trust certificate holders have no right to partition the trust estate (R. 112). The trustee may deal with the personal representatives of any deceased beneficiary, and is not required to determine or look to the heirs (R. 112). The trustee does not warrant its title as owner of the premises or make any representations with reference thereto, nor does it warrant the validity of the lease (R. 113). The trust itself ends at the expiration of the first term of ninety-nine years, and the trustee may then either distribute in kind or sell and distribute the proceeds (R. 117).

SUMMARY OF ARGUMENT

The taxpayer is entitled to deduct depreciation in its income tax returns for the years 1930 and 1931, on the buildings which it erected on its land and used and still uses in its trade or business as a department store. It has not parted with its economic interest in these buildings, as claimed by the Petitioner, because it did not intend to, and did not make, a sale when it conveyed the property to a bank as trustee for land trust certificate holders and took

a lease with privilege of purchase for substantially the amount received for the conveyance. This is evident from the uncontradicted testimony of all the witnesses and the documentary evidence. All the characteristic indicia of mortgage rather than sale are present, such as: the prior debts of debtor; its applications to lenders of money, not purchasers of real estate; inadequacy of consideration; continued occupancy and payment of taxes by grantor; that reconveyance was to be made on payment of the amount of the consideration, with diminishing premium, and interest; the payment of a rental that would assure the certificate holders of the equivalent of interest on their investment; and the obligation to repay at least 80% of the consideration and the plan of both parties for the repayment of it all; and other indicia set forth in the body of this Brief.

Based on this testimony the Board of Tax Appeals found that it was the intention of the parties to create a loan with the land as security and not to make a sale. Therefore the taxpayer had not parted with its economic interest and was entitled to depreciation. The Court of Appeals affirmed.

It is submitted that these findings and decisions, supported as they are by substantial evidence, are binding and conclusive.

There is no estoppel, as claimed by the Petitioner, because: (1) it was not pleaded or proved at the trial; (2) Petitioner, the government, not having been a party to the transaction or misled to its detriment, cannot set it up; and (3) the parties and their privies were fully conversant with the entire transaction and were on notice from the prospectus and the recorded documents.

It is not necessary for the taxpayer to hold the legal title to property in order to be entitled to depreciation. A lessee which has an economic investment in the depreciating assets is entitled to it, as is also a conditional vendee.

As shown later in this Brief a decision in the instant case contrary to the decisions below would create confusion in the administration of the Income Tax Law and furnish a device for avoidance of taxes, and it would seriously interfere with reorganizations under the Bankruptcy Law and in equity.

ARGUMENT

I

The findings and decision of the Board of Tax Appeals in this case, supported as they are by substantial evidence, and affirmed by the Circuit Court of Appeals, are conclusive.

The finding on which we rely is as follows:

> "From a consideration of all the evidence we conclude that the deed given was in reality a mortgage and that the transaction was not one in which the petitioner lost its right to deductions for exhaustion of the property conveyed." (R. 21.)

In *Colorado Bank* v. *Commissioner*, 305 U. S. 23, this Court said (p. 26):

> "Dominant purpose was a question of fact for determination by the Board."

While in that case this Court was referring to the question whether or not a gift was made in contemplation of death, the same principle applies to this case where the question is whether or not a conveyance with lease back and privilege of purchase was intended to be an outright sale or security for a loan. The Board, on the basis of undisputed evidence, found this dominant intention, and its decision was affirmed by the Circuit Court of Appeals.

The indicia of loan with security rather than outright sale, which support the Board's findings, may be summarized from the Board's findings and the statement of evidence, as follows:[2]

1. The prior indebtedness of the taxpayer, over half of which was on a construction mortgage.

2. The desire of the taxpayer to refinance its indebtedness for repayment over a long period on the security of its real estate. The greater part of the original indebtedness was on a construction loan in connection with one of the buildings on which depreciation is claimed.

3. The application to persons who were in the business of lending money and not to such as might be buying real estate.

4. The gross inadequacy of the consideration as compared with the real value.

5. The desire to refinance in such a way that the loan would become self-liquidating over a period of years, rather than requiring refinancing at a later stated period.

6. The preparation of the schedule of land trust retirement figures by Mr. Sweney, the Bank's bond department manager, for Mr. Lazarus, showing the ultimate retirement in forty-eight and one-half years or earlier, depending upon the price paid for the outstanding land trust certificates.

7. The obligation to retire at least 80% of the certificates through the so-called depreciation fund, which would make the retirement of the balance before the end of the first ninety-nine years, when the privilege of purchase expired, an economic necessity.

8. The annual rental charge to operations of $375,000.00 on the company's books, as against an actual rental pay-

[2] See *In re Euclid Doan Co.*, 6 Cir., 104 F. (2d) 712, at p. 715, and 1 *Jones on Mortgages* (8th ed.), Sec. 323 *et seq.*, pp. 404 *et seq.*

able under the lease with privilege of purchase of $162,500.00.

9. The retention of possession by the taxpayer and the continued operation in the same manner as previously, after the conveyance and lease back.

10. The continued payment of taxes by the taxpayer.

11. The option to repurchase for substantially the same amount as was received by the taxpayer and the payment of a rental equal to an interest payment and of all expenses so that the investors would receive the precise interest stipulated.

12. The privilege of purchase price became less as time advanced, whereas the usual practice is in options to purchase involving sales that the option price becomes greater as time elapses.

13. On exercise of the privilege of purchase the lessee was to get only the title that the lessor had at the date of lease, with which the lessee agreed it was satisfied at the time of the lease.

14. In case of the condemnation of a substantial part of the demised premises the lessee would be bound to exercise the option to purchase.

15. There was to be no diminution of rent because of appropriation to public use of any part of the demised premises or in the event of destruction of the buildings by fire or otherwise.

16. The lessee agreed not only to repair and rebuild but also to reconstruct any improvements that might suffer loss through damage or destruction whether the proceeds of insurance were sufficient for these purposes or not.

17. The trustee might deal with the personal representatives of any deceased beneficiary and was not required to determine or look to the heirs.

18. The fact that all the persons active in the transaction testified that it was their intention to have a loan on the security of the real estate, and not a sale.

A. *This Court does not substitute its conclusions as to facts for that of the Board.*

The Commissioner cites as authority for review of the Board's decision, as affirmed by the Circuit Court of Appeals, the following cases (Brief of Petitioner, p. 12):

> *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491;
> *Bogardus* v. *Commissioner*, 302 U. S. 34, 39;
> *Helvering* v. *Rankin*, 295 U. S. 123, 131.

But, in the *Rankin case* (p. 131), the Court said:

> "The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made."

There is nothing inconsistent with this in either the *Tex-Penn Company* or the *Bogardus* case. In the former, this Court said, at page 490:

> "They (the findings of the Board) must be taken as established if supported by substantial evidence. . . ."

And again, on page 394:

> "The validity of the ultimate finding above quoted is to be tested by what in fact was done rather than by the mere form of words used in the writings employed."

In *Helvering* v. *National Grocery Company*, 304 U. S. 282, this Court reaffirmed the doctrine of the *Rankin* case, as set forth in the language above quoted, and said:

> "To draw inferences, to weigh the evidence and to declare the result was the function of the Board. *Halburd* v. *Commissioner*, 296 U. S. 300, 306; *Elmhurst Cemetery Company* v. *Commissioner*, 300 U. S. 37, 40."

Applying the rules laid down in these cases, there are two criteria by which to test the decision of the Board. The first test is whether the correct rule of law was applied to the findings. As to this, we do not understand that there is any dispute: If the transaction was in reality a mortgage, as found by the Board, the Commissioner has not disputed that the taxpayer is entitled to take depreciation on its buildings. The second question is whether the findings of fact of the Board are supported by substantial evidence. In view of the testimony that has been detailed and the rules of law applicable, there can be no question that the findings of the Board are supported by substantial evidence. Whatever the inferences that might have been drawn by the Board, all such questions are now concluded by the Board's findings and decision and by the affirmance by the Court of Appeals.

II

The taxpayer need not have the legal title in order to be entitled to an allowance for depreciation.

Section 23 (k) of the Revenue Act of 1928 provides that in computing net income there shall be allowed as a deduction:

> "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

There is no doubt that the property on which depreciation is claimed is used in the taxpayer's trade or business. The taxpayer erected the buildings at its own cost and, therefore, finds itself in the position of the lessee taxpayers who were allowed depreciation in *Duffy* v. *Central R. Co. of New Jersey*, 268 U. S. 55; *Cogar* v. *Commissioner*, 6 Cir., 44 F. (2d) 554; and *Gladding Dry Goods Co.* v.

Commissioner, 2 B. T. A. 336, 338; unless it has since the erection of the buildings recouped its original investment therein. But that is the very thing that the Board of Tax Appeals found, on substantial evidence to support its findings, did not happen, and, therefore, taxpayer has not lost its economic interest in the buildings. See *Commissioner* v. *H. F. Neighbors Realty Co.*, 6 Cir., 81 F. (2d) 173.

A conditional vendee, though he has not the legal title, is entitled to deduct depreciation.

In I. T. 2275 (I. R. Cumulative Bulletin V-1, page 62), it was held that a vendee of real estate under an executory contract of sale on deferred payments is entitled to depreciation from the time possession and the burdens and benefits of ownership are transferred to him, though he may, under state law have no title to the property until the entire purchase price is paid.

In *Burroughs Adding Machine Co.* v. *Bogdon*, 8 Cir., 9 F. (2d) 54, the third paragraph of the syllabus reads as follows:

> "A conditional contract for sale of personal property is not changed into a lease by designating instrument as lease, parties as lessor and lessee, and consideration as rentals or rent; the governing consideration being legal effect of instrument as gathered from all its provisions."

The instrument in question in that case provided for the possession and use of the machines by the "lessee," $75.00 being paid down upon execution and $47.22 monthly during the term until $424.97 was paid, after which the lessee had the option to purchase the machines upon the payment of an additional sum of $47.22. The Court (9 F. [2d] at p. 56) said:

"The final payment, which is nominally the purchase price, is so small in comparison with the entire purchase price as to leave no real choice to the 'lessee.' The obvious purpose was to dispose of the machine under such conditions that when the 'lessee' had paid the 'rental' he could not afford to fail the relatively small final payment to obtain it. This would have been the obvious and natural, if not the inevitable, result. Evidently it was what the parties desired and intended to accomplish."

Petitioner claims that taxpayer in the instant case is in the same situation as the taxpayer was in *Weiss* v. *Wiener*, 279 U. S. 333 (Brief, pp. 23 and 24). That case takes a realistic view of the question of depreciation. All that it decides is that one whose business is investment in real estate on ninety-nine year leases, who had nothing to do with the erection of the buildings and had, therefore, never been affected by their depreciation cannot make a deduction therefor. This is obvious from the language of Mr. Justice Holmes (279 U. S. at pp. 335-6), as follows:

"He was allowed all sums paid for repairs but nothing for the estimated obsolescence for which he had not paid. . . . It might never fall on him."

In the instant case there is no question but that, realistically speaking, taxpayer owns the property. It erected the buildings, which was not the case with Wiener. It is substantially bound to acquire the fee title to the property, which was not the case with Wiener. It is conducting its own business on the property in question, which was not the case with Wiener. Wiener had even reassigned some of the leases on which he was claiming depreciation, and had no interest therein, except for the profit from his

transaction and a possible contingent liability in case his assignee or sub-lessee defaulted. Some of Wiener's leases had been surrendered to the lessor. That would not be possible in the instant case except in the event of the insolvency of the taxpayer.

III

The transaction whereby taxpayer conveyed its property to the bank as trustee and leased it back was in substance an encumbrance of its property for a loan and not a sale.

A. *The substance of the transaction may be shown by oral testimony and circumstances outside of the written instrument of conveyance.*

This was decided in *Peugh* v. *Davis*, 96 U. S. 332, and has apparently never been questioned since. See *Brick* v. *Brick*, 98 U. S. 514 and *United States* v. *Shelby Iron Co.*, 273 U. S. 571, 578.

B. *A conveyance of real estate, although absolute in form, if intended by the parties to be security for a loan, is in fact a mortgage.*

The leading case on this proposition is *Russell* v. *Southard*, 12 Howard 139. See, also, the following:

Hughes v. *Edwards*, 9 Wheaton 489.
Morris v. *Nixon*, 1 Howard 118.
Peugh v. *Davis*, 96 U. S. 332.
Teal v. *Walker*, 111 U. S. 242.
White v. *Redenbaugh*, 41 Ind. App. 580.
Edrington v. *Harper*, 3 J. J. Marsh. (Ky.) 353.
Woodward v. *Pickett*, 8 Gray (74 Mass.) 617.
Kraemer v. *Adelsberger*, 122 N. Y. 467.
Weiseham v. *Hocker*, 7 Okla. 250.

This rule is applied in the following federal income tax cases:

United National Corp. v. *Commissioner*, 33 B. T. A. 790.

First National Bank in Wichita v. *Commissioner*, 10 Cir., 57 F. (2d) 7, certiorari denied, 287 U. S. 636; as well as in the instant case and in

Commissioner v. *H. F. Neighbors Realty Co.*, 6 Cir., 81 F. (2d) 173.

Where there is a conveyance of real estate and the vendee at the same time delivers to the vendor a contract by which he agrees to reconvey the premises by a specified time, upon the repayment of the purchase money with interest, the circumstances furnish presumptive evidence that the deed, although absolute upon its face, was intended as a mortgage, and it will be so held in equity.

Marshall v. *Stewart*, 17 Ohio 356.
Cotterell v. *Long*, 20 Ohio, 464.
Helmbold v. *Helmbold*, 25 Ohio App. 32.
Coleman v. *Miller*, 8 Ohio Dec. Repr. 179.
Bailey v. *Poe*, 142 Md. 57.
Obrecht v. *Friese*, 148 Md. 484.
Nugent v. *Riley*, 1 Metcalf (42 Mass.) 117.
Peoples Street Railway Co. v. *Spencer*, 156 Pa. 85.
1 *Jones on Mortgages* (8 Ed.), Section 317, pp. 393 and 394.
79 *A. L. R.* 938, Introduction to Annotation Entitled "Deed Absolute on its Face, with Contemporaneous Agreement or Option for Repurchase by Grantor, as Mortgage *vel non*."
16 *Ruling Case Law*, 545, Landlord and Tenant, Section 16.

Proof that an instrument in the form of a lease is intended to be a mortgage is not limited to equity proceedings. It may be set up as a defense in an action by the lessor to dispossess the tenant for non-payment of rent. *Reich* v. *Cochran*, 151 N. Y. 122, at 127. See, also, I. T. 2679 (I. R. Cumulative Bulletin XII-1, p. 103).

C. *It is a question of proof whether or not a conveyance was in fact given as security for a loan.*

In *Russell* v. *Southard*, 12 Howard 139, the conveyance, absolute in form, was held to be a mortgage, and the grantor entitled to redeem. The Court said that a question of great importance was to inquire whether the consideration was adequate to induce a sale (p. 148). There was also oral testimony, which was disputed by the defendant, that it was the intention of the parties to create a mortgage and not make a purchase and sale. The Court said (p. 151):

> "In doubtful cases the Court leans to the conclusion that the reality was a mortgage, and not a sale."

Citing *Conway* v. *Alexander*, 7 Cranch 218, and other cases.

Again, on page 152, the Court said:

> "The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage."

The cases cited in this Brief under paragraphs A and B, *supra*, are to the same effect. The cases cited in the Brief of Counsel for Petitioner (pp. 14 to 17) do not lay down any different rule, but were cases where the Court found that the evidence did not support the contention that the conveyance was a mortgage. For instance, in *Conway* v. *Alexander*, 7 Cranch 218 (Petitioner's Brief, p. 14), it was not shown that the consideration was inadequate and it was shown that the grantor intended to make a sale and not a loan. The Court said, on page 240:

> "This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of money advanced and no proposition for or conversation about a mortgage."

Again, on page 241:

> "The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irre-

sistible proof that a sale could not have been intended. . . . But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated."

And on page 237:

"Doubtful cases have generally been decided to be mortgages."

In *Slutz and Larue* v. *Desenberg*, 28 O. S. 371 (Petitioner's Brief, pp. 14 and 21), it appeared that the grantor was anxious to sell his property because he was leaving for California and wanted to raise some money for the trip. He delivered possession to the vendee contemporaneously with the conveyance, there was no evidence of gross inadequacy of consideration, and the vendor's evidence that he did intend the transaction to be a loan was disputed by other witnesses.

IV

There is no estoppel against the taxpayer in this case.

A. *Estoppel was neither pleaded nor proved before the Board of Tax Appeals and should not, therefore, be considered by this Court.*

Helvering v. *Salvage*, 297 U. S. 106, 109, and *General Utilities & Operating Company* v. *Helvering*, 296 U. S. 200, 206, are decisive of this point.

B. *The Petitioner cannot set up an estoppel because no representation was made to him or anyone in privity with him by the taxpayer.*

A stranger to the transaction cannot set up an estoppel. *Deery* v. *Cray*, 5 Wall. 795; *Branson* v. *Wirth*, 17 Wall. 32; and *Kitzmiller* v. *VanRennselaer*, 10 O. S. 63, illustrate this principle, which goes back to *Coke on Littleton*, Section 352a.

C. *The doctrine of estoppel could not apply here because the bank, which made the loan to the taxpayer, was fully advised as to all the circumstances.*

See *Brant* v. *Virginia Coal & Iron Company*, 93 U. S. 326.

Even if the ultimate land trust certificate holders, who may change from day to day, were involved, they were advised of significant circumstances by the bank's prospectus (Exhibit 8, R. 159, ffg. R. 118), their certificates (Exhibit 7, R. 100), and the lease and declaration of trust, which were duly recorded and which are incorporated by reference in the certificates. These show the gross inadequacy of the price paid for the property, the purchase option at a fixed price which decreases as time elapses, the payment of the so-called rental which is the fixed interest payment on the loan, the so-called depreciation fund which legally requires the repayment of 80% of the purchase price and economically requires the repayment of the balance, that the transaction was one of "financing" by the taxpayer, and other circumstances referred to in the Statement, (*supra*, p. 10 of this Brief).

The fact that counsel for the bank may have given their opinion that the land trust certificates were not subject to then existing Ohio personal property taxes under a ruling of the Attorney General of Ohio (1926 Opinions, Attorney General of Ohio, 375) is not controlling. *Ward* v. *Ward*, C. C. S. D. N. Y., 131 Fed. 946, 953, affirmed, 145 Fed. 1023.

In *In re Euclid Doan Co.*, 6 Cir., 104 F. (2d) 712, the question was whether debtor in reorganization under 77 B of the then Bankruptcy Act,[4] which had conveyed its property but retained possession under a renewable ninety-nine

[3] The trustee, not the beneficiary of a trust, paid personal property taxes under the Ohio law then in force. General Code of Ohio, Sec. 5370, 1 Page's Annotated Ohio General Code (1926 ed.). Under the terms of the lease in the instant case the taxpayer was required to reimburse the trustee-lessor for any taxes it was required to pay. (Exhibit 6, Art. Five, R. 63.) See on this point, Goldman and Abbott, *Land Trust Certificates* (1928), 2 U. of Cin. L. Rev. 255, at p. 279.

[4] 48 Stat. 912, 11 U. S. C. A., Sec. 207.

year lease, in a land trust certificate transaction similar to that in the instant case, could continue in occupation of the premises or must surrender them to the trustee because of default under the lease. The question turned on whether the transaction was a sale or a mortgage. The master commissioner, to whom the issue was referred, found the transaction a mortgage. His report was confirmed by the District Court and upheld by the Circuit Court of Appeals, following the *Neighbors* (81 F. [2d] 173) and the instant case (101 F. [2d] 728).

The question of estoppel was raised by the trustee for land trust certificate holders and overruled. The Court said (104 F. [2d] at p. 715):

> "The party asserting estoppel must be able to show that he has been injured by the conduct of the other party and that he had no knowledge or means of knowledge of the truth."

This question is vital in the reorganization of any company which has financed its needs through a land trust certificate issue. A contrary decision would make such reorganizations impracticable. In every case where the question has been raised in reorganizations in the District Courts, they have assumed jurisdiction over the real estate and treated the land trust certificate holders as secured creditors.

In re Hotel Gibson Co., S. D. Ohio, 11 F. Supp. 30.[3]

In the case of *In re Westover*, 2 Cir., 82 F. (2d) 177 (Petitioner's Brief, p. 23), estoppel was successfully asserted by the holders of mortgage participation certificates against the original seller of these certificates and

[3] See unreported cases listed in 52 Harv. L. R. 1153, note 29, and also *In re Sycamore Hammond Realty Co.*, Case No. 13031 in D. C. S. D. Ohio, W. Div.

its affiliated corporation, which had issued them. The certificate holders were directly concerned in the reorganization proceeding under 77 B of the then Bankruptcy Act. The estoppel was set up by immediate parties to the transaction against another party to the transaction. The court said that no private agreement to which the certificate holders were not parties or privies and of which they had neither knowledge nor notice could be set up to their prejudice in that proceeding.

In the instant case the land trust certificate holders are not parties nor directly interested in the proceeding. As shown previously, the bank with which taxpayer dealt understood the transaction fully and the certificate holders were put on notice by statements in the prospectus and in the recorded instruments, and there is no evidence in the Record that anyone of them was misled to his detriment.

V

The taxpayer has not recovered its investment in its business property, and, therefore, is entitled to continue to take depreciation on its buildings as it did before the land trust certificate transaction took place.

This point was decided in *Commissioner* v. *H. F. Neighbors Realty Co.*, 6 Cir., 81 F. (2d) 173,* in which case the firm of counsel for taxpayer in the instant case filed a brief as *amici curiae*. No application for writ of certiorari was filed by counsel for the Commissioner. While the main point in the *Neighbors* case was the question of taxable gain or loss on the transfer to the trustee for land trust certificate holders, that case also decided (p. 176) that the Neighbors Realty Company, which was in the position of the taxpayer in the instant case, could take depreciation on its buildings.

* See to the same effect I. T. 2679, Internal Revenue Cumulative Bulletin XII-1, page 103 (June, 1933).

It is in evidence in the instant case that the buildings were erected over a period of years from 1908 to 1927 at a total cost of $2,467,952.57 (R. 42). There is no evidence as to the basis on which taxpayer held the land. Therefore, it is not apparent from the Record whether the $3,159,687.50, which was received from the Huntington Bank, was in excess of the cost to taxpayer of the land and buildings. There has been no attempt on the part of the Commissioner to tax any gain, if any such existed, nor on the part of the taxpayer to deduct any loss.

The rule contended for by the Commissioner, which would make the conveyance to the trustee for land trust certificates a closed transaction for the determination of gain or loss, would only work confusion in these transactions and might ultimately work to the disadvantage of the government in connection with its income tax collections. For instance, if the amount of money that the company was borrowing was less than its cost basis, and it had a profitable year, a corporation could use a similar transaction as a device to reduce considerably its income taxes in that year. On the other hand, if it had had large losses in the tax year and would have a similarly large profit as a result of financing through a land trust certificate issue, it could make this financing without paying any taxes and henceforth hold its land and buildings on a higher basis, when it exercised the privilege of purchase.

If the contention of counsel for Petitioner (Brief, p. 23) is valid, that the taxpayer recovered the full value of the property because the lease with privilege of purchase was worth the difference between the real value of the property and the cash paid, then a transaction like this could be used as a device for amortization of such excess value over the period of the lease. For instance, the lease could be made for ten years and then there would be an amortization of about $325,000.00 a year, instead of merely a $50,-

000.00 deduction for depreciation. An example of this appears in the case of *Robert A. Taft* v. *Commissioner of Internal Revenue*, 27 B. T. A. 808. The petitioner in that case had offered to purchase the property for $185,000.00, $50,000.00 in cash, $25,000.00 at the end of five years, $25,000.00 at the end of ten years and the balance to be evidenced by privilege of purchase, without obligation, contained in a fifteen year lease. The petitioner-taxpayer in that case claimed at the outset the right to amortize his payment of $50,000.00 over the life of the lease. The Commissioner had already allowed him depreciation at the rate of four per cent on $20,000.00, the value of the buildings on the property. The Board found that he was not entitled to amortization as he was required to pay $100,000.00 out of a total of $185,000.00 purchase price and there was, therefore, an economic necessity for his paying the other $85,000.00 before the end of the lease. He was, therefore, to be treated as in substance the owner of the property rather than a lessee who had paid a premium for a lease which would be lost at the lease's termination. In this the Board sustained the Commissioner's contention.[7]

It is obvious that sound business judgment would require this result and the possibility of taxpayer's not reacquiring the fee by exercise of privilege of purchase is too remote to be considered. A slight possibility is not sufficient to deprive the taxpayer of an otherwise proper deduction.

Commissioner of Internal Revenue v. *The Hub, Inc.*, 4 Cir., 68 F. (2d) 349, 351.
Cf. *Burroughs Adding Machine Co.* v. *Bogdon*, 8 Cir., 9 F. (2d) 54.

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[7] See to the same effect: *Pig and Whistle Company* v. *Commissioner*, 9 B. T. A. 668, and *E. M. Diebold* v. *Commissioner*, 19 B. T. A. 438.

In the instant case the taxpayer is required by the terms of the lease itself to pay into a depreciation fund for the ultimate benefit and security of the land trust certificate holders at least $2,600,000.00 out of a total purchase price of approximately $3,250,000.00 and this amount would become the property of the land trust certificate holders in case of lessor's default or failure to exercise the privilege of purchase within the first ninety-nine years of the lease. (See *supra*, p. 12.)

VI

Cases cited by Commissioner's Counsel distinguished.

It will not be necessary to discuss all of the cases cited in Petitioner's Brief, as many of them are cited merely for obvious points of law and others, as previously shown,[1] turn on the peculiar facts in each case and the findings of the trial court on those facts.[2]

In *Nitkey* v. *Ward*, 199 Minn. 334 (Petitioner's Brief, p. 22), there was a finding of the trial court based on the evidence in that case, that it was not the mutual intention of the parties to create a mortgage rather than to have a sale. The plaintiff in that case was the only witness to support his theory of mortgage (p. 342), and his testimony was shaken in this and other respects. The plaintiff had an option to purchase the property from strangers for the sum of $1,025,000.00 and contemporaneously with the exercise of the option he conveyed the property to a trustee designated by the bankers who arranged the transaction, for $930,000.00. The privilege of purchase given in the lease to a corporation, not the grantor, was $1,050,000.00.

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[1] See, for instance, *Stutz and Larue* v. *Desenberg*, 28 O. S. 371 (Brief, *supra*, p. 25); *Conway* v. *Alexander*, 7 Cranch 218 (Brief, *supra*, p. 24.)

[2] For example, *American National Bank* v. *Groft*, 56 S. D. 460; *Lemond Co.* v. *McNabb*, 109 W. Va. 142; *Gibson* v. *Kraay*, 3 O. L. R. 671, affirming 2 O. N. P. (N.S.) 537.

At the same time first mortgage leasehold bonds were issued for $247,500.00 by the corporation. The only investment that the plaintiff had in the entire transaction was $15,000.00, which was the earnest money deposited in escrow with the Chicago Title & Trust Co. (p. 337). It is thus obvious that the plaintiff in that case had no investment in the property, was not seeking a loan but merely a speculation out of which he could make money through the floating of investment securities, and that there was no inadequacy of price. All of the witnesses except the plaintiff himself testified that it was the intention to have an outright sale and not a mortgage by way of security. On this record the trial court found as a fact that there was no equitable mortgage and the appellate court said that that finding was amply supported by the evidence. The Court said, on p. 340:

> "The finding of the trial court either way will not be disturbed even where there is strong evidence to the contrary."

In *City National Bank Building Co.* v. *Helvering*, App. D. C., 98 F. (2d) 216 (Petitioner's Brief, p. 22), the finding of the Board of Tax Appeals was in favor of the Commissioner on the state of facts existing in that case. The Board said (34 B. T. A. 93, at p. 99):

> "The facts in the present case are different in some respects from the facts in the *Lazarus* and *Neighbors* cases. It may be that these differences serve to distinguish the cases. The transactions in the *Lazarus* and *Neighbors* cases were initiated by existing corporations in order to refinance their indebtedness. Here the transactions were initiated by bankers who desired some business."

In that case investment bankers obtained an option to purchase the stock of a Nebraska corporation for $940,

000.00. The corporation owned an office building in Omaha subject to a mortgage of $560,000.00. The bankers formed a new corporation and assigned this option to it. The Nebraska corporation then conveyed the land and building to the new corporation, the taxpayer, which in turn conveyed the property to the Cleveland Trust Company, which executed a lease of the building to the taxpayer for a term of ninety-nine years with option to purchase. The Trust Company also executed a declaration of trust covering one thousand land trust certificates of a face value of $1,000.00 each, with interest at 5½% per annum and no depreciation fund. The taxpayer received $930,000.00 from the sale of these certificates. It simultaneously executed a mortgage on its leasehold and issued $600,000.00 face value 6½% fifteen-year sinking fund bonds for which it received $540,000.00. The taxpayer thus received from the sale of the land trust certificates and bonds $1,470,000.00. Its disbursements in connection with the transaction were $940,000.00 for the stock of the original owner, $560,000.00 to retire the old first mortgage and $25,000.00 commission, or a total of $1,525,000.00. The difference between the receipts and disbursements of $55,000.00 was made up by a contribution in this amount by the bankers. The taxpayer in the case claimed, and was allowed, a deduction for amortization of its leasehold.

The City National Bank Building Company had never used the building on which it sought to deduct depreciation in its trade or business before it became a lessee, it acquired the lease purely for speculative purposes, and it made no substantial investment in the property which it did not contemporaneously recover. It was therefore in the position of the taxpayer in *Weiss* v. *Wiener*, 279 U. S. 333, who acquired the lease for investment or speculative purposes.

The cases of *National Stores* v. *Board of Equalization*, 111 W. Va. 203, and *Narragansett Mutual Fire Insurance Co.* v. *Burnham*, 51 R. I. 371, are cases of interpretation of local taxation statutes, in which there was no evidence outside of the written documents, to prove the real intention of the parties.

Senior v. *Braden*, 295 U. S. 422, (Petitioner's Brief, pp. 17 and 18) arose out of an attempt of the Ohio authorities to tax land trust certificates under a revision of the tax laws passed in 1931 (114 Ohio Laws 714), three years after the transaction in the instant case. The Supreme Court of Ohio held the certificates taxable, 128 O. S. 597. This Court, on appeal, held that under the Fourteenth Amendment of the Constitution of the United States, Ohio could not impose an intangible property tax on land trust certificates owned by Ohio residents, whether these certificates represented land outside of Ohio or within Ohio. The basis for this decision was that the interest of those particular land trust certificate holders was an equitable interest in real estate and that taxing the certificates themselves as well as the land was double taxation in violation of the Fourteenth Amendment. The land trust certificates sold by the Huntington National Bank were not involved in that case (295 U. S. at p. 428, note 3). The records in the *Senior* case and in the instant case are entirely different, as are the parties. The only substantial evidence offered in the *Senior* case as to the nature of the land trust certificate transactions consisted of copies of the land trust certificates, the leases and the declarations of trust. There was no pleading or evidence offered by either side as to the circumstances under which the leases and declarations of trust were made, as to the intentions of the several owners in conveying their properties to trustees and receiving back leases with privilege of purchase, as to the values of the properties, as to whether there was pre-existing indebted-

ess for construction loans or otherwise, or as to the forts made by the owners of the property to make other nancial arrangements. In the absence of evidence to the ntrary, a deed is considered, even in equity, as an abso-te conveyance, whether there is a lease back or not.[19]

In the case of *Commissioner* v. *H. F. Neighbors Realty o.*, 6 Cir., 81 F. (2d) 173, the Commissioner made the me contention that he is making here as to the supposed nding effect of *Senior* v. *Braden*, 295 U. S. 422, in a milar situation to that involved in the instant case. The ourt considered the argument and rejected it for reasons ated on pages 175 and 176 of that opinion.

In the instant case, as in the *Neighbors Realty Company se*, there was substantial evidence on which the Board of ax Appeals based its findings and decision in favor of the xpayer. As pointed out by the court below in the instant se, it and the *Neighbors* case are substantially alike, xcept that the instant case is a stronger case for the tax-ayer than was the *Neighbors* case. 101 F. (2d) 728, at ages 729 and 730.

CONCLUSION

In income tax matters, the substance, not the form, con-rols. The Board of Tax Appeals, on a full presentation f evidence and arguments, held that the transaction in-olved here is, in reality, a mortgage and that, therefore, he taxpayer is entitled to take the depreciation claimed n the buildings which it uses in its business. The Com-issioner does not and cannot dispute that the Board pplied the correct rule of law, namely, that if the transac-on is, in substance, a mortgage, the taxpayer is entitled o a deduction from its income tax for depreciation. All

[19] See *Wallace* v. *Johnstone*, 129 U. S. 58, at p. 64 (Petitioner's Brief, p. 4 and 21).

that counsel for the Commissioner is asking this Court to do is to draw different inferences from the evidence before the Board of Tax Appeals than were drawn by that Board. There can be no question that there is ample evidence in the record to support the inferences drawn by the Board and its ultimate findings. The Court of Appeals affirmed the decision of the Board. Even if it were open to this Court, as it is not under its decisions, to weigh the evidence, the decision of the Board, affirmed by the Court of Appeals, would be entitled to the greatest weight. The principle is also applicable that the courts lean, in case of doubt, to an interpretation that the transaction is a mortgage. But, as before shown, this Court does not review the weight of the evidence; it determines only if a correct rule of law was applied and whether there was substantial evidence to support the findings of the Board under the applicable principles of law. As the correct rule of law was applied to the facts found by the Board and there was substantial evidence to support its findings, the decision of the Circuit Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

MURRAY SEASONGOOD,
ROBERT P. GOLDMAN,
Counsel for Respondent

PAXTON & SEASONGOOD,
HARRY STICKNEY,
Of Counsel.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(k) Depreciation.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

SUPREME COURT OF THE UNITED STATES.

No. 56.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. The F. & R. Lazarus & Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 4, 1939.]

Mr. Justice Black delivered the opinion of the Court.

In computing its net taxable income for 1930 and 1931, respondent claimed depreciation on three buildings occupied and used in its business as a department store. During those years, the legal title to two of these properties and an assignment of a ninety-nine year lease to the third were in a bank as trustee for certain land-trust certificate holders. These properties had been transferred to the trustee by the respondent in 1928 and the trustee had at the same time leased all three back to respondent for ninety-nine years, with option to renew and purchase. In claiming the deduction, respondent insisted that the capital loss from wear, tear, and exhaustion of the buildings was falling upon it, thus entitling it to the statutory allowance for depreciation of buildings.[1] The Commissioner disallowed this deduction on the ground that the statutory right to depreciation follows legal title. Reviewing the evidence, the Board of Tax Appeals concluded that the transaction between respondent and the trustee bank was in reality a mortgage loan and ordered the deduction allowed,[2] and the Circuit Court of

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, 799-800. In computing net income there shall be allowed as deductions:

Depreciation.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

[2] 32 B. T. A. 633. The Board found the depreciable life of the property to be fifty years, instead of forty as originally claimed by respondent.

Appeals affirmed.[3] Upon facts which it considered "in all essential respects identical," the Court of Appeals for the District of Columbia held depreciation not allowable.[4] Because of the different results reached by the Courts of Appeal, we granted certiorari.[5]

The Federal income tax is aimed at net income determined from gross income less items such as necessary expenses incurred or capital consumed in earning it. Thus, the controlling statute permits a taxpayer in computing net income to deduct a "reasonable allowance for . . . exhaustion, wear and tear." While it may more often be that he who is both owner and user bears the burden of wear and exhaustion of business property in the nature of capital, one who is not the owner may nevertheless bear the burden of exhaustion of capital investment. Where it has been shown that a lessee using property in a trade or business must incur the loss resulting from depreciation of capital he has invested, the lessee has been held entitled to the statutory deduction.[6]

Here, the taxpayer used business property in which it had a depreciable capital investment, provided it had not recovered its investment through a sale. The Board in substantial effect found that the instrument under which the taxpayer purported to convey legal ownership to the trustee bank was in reality given and accepted as no more than security for a loan on the property; the "rent" stipulated in the concurrently executed ninety-nine year "lease" back was intended as a promise to pay an agreed five per cent interest on the loan; and the "depreciation fund" required by the "lease" was intended as an amortization fund, designed to pay off the loan in forty-eight and one-half years. These findings are supported by evidence which permits, at most, conflicting inferences and are, therefore, conclusive here. And, unless the Board committed error of law we must affirm.[7]

We think the Board justifiably concluded from its findings that the transaction between the taxpayer and the trustee bank, in writ-

[3] 101 F. (2d) 728; cf. Commissioner v. H. F. Neighbors Realty Co., 81 F. (2d) 173.

[4] City National Bank Building Co. v. Helvering, 98 F. (2d) 216, 217.

[5] — U. S. —.

[6] Duffy v. Central R. Co. of N. J., 268 U. S. 55; Appeal of Gladding Dry Goods Co., 2 B. T. A. 336, 338; Cogar v. Commissioner, 44 F. (2d) 554. See, Bowman-Co. v. Commissioner, 32 F. (2d) 404, 405; Nat'l City Bank of Seattle v. United States, 64 C. Cls. 236, cert. den. 276 U. S. 620; Commissioner v. H. F. Neighbors Realty Co., *supra*.

[7] 26 U. S. C. 641(c).

ten form a transfer of ownership with a lease back, was actually a loan secured by the property involved. General recognition has been given the "established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money."[8] In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specifically emphasized the equitable nature of proceedings before the Board of Tax Appeals by requiring the Board to act "in accordance with the rules of evidence applicable in courts of equity of the District of Columbia." 26 U. S. C. 611. The Government relies in part upon *Senior* v. *Braden*, 295 U. S. 422. Whatever the significance of that case, it can have no application here. In the *Braden* case, the equitable doctrine—here controlling—of looking to extrinsic evidence behind a transfer absolute on its face to determine whether only a security transaction was contemplated by the parties, was neither invoked nor passed upon.

Judgment below is

Affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[8] Pugh v. Davis, 96 U. S. 332, 336; Hughes v. Edwards, 9 Wheat. 489, 495; Russell v. Southard, et al., 12 How. 139; Teal v. Walker, 111 U. S. 242. See cases collected in 79 A. L. R. 937.